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## LOOH KEO v. LOOH CHEE PENG & ORS

HIGH COURT MALAYA, KUALA LUMPUR
LIZA CHAN SOW KENG J
[SUIT NO: WA-22NCC-112-03-2022]
22 NOVEMBER 2023

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**Abstract** – *In a tussle over shares in companies, a father claims that all the said shares in the name of his children are held on trust and that he had never intended to give the said shares to them. The present action thus raises squarely the question of whether as a matter of fact and law, there exists an express trust or a resulting trust, which pivots on the father's actual intention, which is very fact-sensitive. This intention could be direct evidence or inferred from evidence, including that of the father's conduct.*

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***TRUSTS:*** *Trust – Shares in companies – Father seeking return of shares in companies presently registered in names of children – Shares allegedly held on trust by children for father – Children controlled companies at Board and/or shareholder levels – Whether father intended to give shares to children – Whether children paid for transfers and allotments of shares to their names – Whether presumption of advancement/gift arose – Whether articles of association of companies recognised trust – Whether presumption of advancement rebutted – Whether shares held on trust – Whether shares ought to be returned to father*

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The present action was a family dispute where the octogenarian plaintiff, a father, sought the return of the shares in the companies presently registered in the names of his five children, the first to fifth defendants ('individual defendants'), which the plaintiff claimed were held on trust for him. The action was filed as a result of the individual defendants' refusal to cooperate when the plaintiff sought to put his affairs and assets in order. By estimation, the assets of at least approximately 8,700 acres of oil palm plantation alone had a conservative value ranging between approximately RM261 million and RM348 million. The plaintiff testified that (i) he personally acquired and funded the acquisition of all the substantial assets associated with his empire, which began in the 1970s; (ii) he was the boss in the family business, the primary decision-maker who made all the major decisions, including the acquisition of lands and properties and the price thereof, the acceptance of any financing, the charging of his assets or his companies' assets to the financiers, fixing of salaries of the management personnel. In short, the plaintiff was the one calling the shots particularly when it came to any financial matters; (iii) he brought his children into the family business to train them and to provide them a living whilst they gained experience and contacts. Shares that were in their names were transferred back to the plaintiff or his nominated transferee whenever required by the plaintiff;

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(iv) due to his illiteracy and lack of formal education, he was required to rely on and trust those who assisted him in his work and business dealings and was, in this sense, vulnerable. These trusted persons were mainly the plaintiff's family members, although there were also several individuals, not of the family, whom he relied on to get work done; (v) the plaintiff vehemently disavowed any gift to the individual defendants of his shares; and (vi) the plaintiff wished for his assets, which he accumulated over 50 years, to be passed down through the generations for at least 50 years. The plaintiff alleged that he never intended to give the shares to the individual defendants. The individual defendants were involved and had employment in the plaintiff's business in its later years, beginning in 2004. The individual defendants presently in various combinations, controlled the sixth to 14th (except the 10th to 12th) defendants ('corporate defendants') at the Board and/or shareholder levels. The individual defendants contended that (i) the plaintiff had given away 70% of his wealth to them; (ii) the plaintiff had never alleged that the shares held in the individual defendants' names were beneficially owned by him or held on trust for him; (iii) a presumption of advancement/gift arose in relation to all the shares transferred to the individual defendants by or at the behest of the plaintiff; and (iv) the articles of association of the companies did not recognise a trust. The issue that arose were whether as a matter of fact and law, there existed an express trust or a resulting trust.

**Held (allowing claim):**

**(1)** The individual defendants had relied on the presumption of advancement arising out of the close relationship of father and children. The presumption of advancement no doubt gave the individual defendants as recipients of the shares an advantage which, if not negated, would operate to form the basis of proof. However, this was not a case where the parties were not present to give evidence of their intentions. In this significant aspect, the presumption of advancement only comes into play if the plaintiff's intention could not be discerned from the evidence. The plaintiff here, although elderly, sickly and testified from the hospital on numerous days and in the course of trial, had his legs amputated, had the mental faculties or clarity of mind to provide the court with useful evidence of his intentions and personal knowledge. He had defended the presumption of advancement on the basis that he was still competent to testify as to his intentions regarding the transfer which was to create a trust or to retain the beneficial interest in the shares of his companies. Unless supported by objective evidence, the presumption of advancement would not be given greater weight. (para 39)

**(2)** The individual defendants and the corporate defendants paid nothing for the transfers and allotments of shares to their names. They took instructions from the plaintiff, although when it suited them, they would say that matters were discussed with their father before decisions were

made. The plaintiff's evidence on why it was not necessary to record the nominee arrangement with the individual defendants, was not credibly challenged in cross-examination. Thus, the plaintiff's evidence ought to be accepted. In any event, the plaintiff's evidence as to why no nominee arrangement with the individual defendants were recorded was not inherently improbable because they were his children. There was no basis not to trust them before the shares were transferred to them. (paras 49, 51 & 52)

**(3)** Based on documentary evidence, including the direct evidence of the plaintiff and his family members, it was manifestly plain that the plaintiff had no intention of gifting shares in his companies to anyone, including the individual defendants but had instead always intended to retain the beneficial interest in the shares of his companies. There was also a consistent course of conduct by the plaintiff to enable the court to find a presumption of intention in favour of the plaintiff, pursuant to s. 114(d) of the Evidence Act 1950. With the presumption of intention, it fell on the individual defendants to rebut the presumption. The individual defendants' proffer of (i) a bare denial of the plaintiff's long-standing practice of putting shares in the names of family members and trusted third parties and the plaintiff's intention; and (ii) feigning no knowledge of the plaintiff's arrangements with family members and trusted third parties and denial that the same arrangement applied to them and the shares they held in the companies, did not add to their case. Bare denials do not go towards discharging the onus or evidential burden of proof shifted to them given the weighty evidence adduced by the plaintiff. (paras 53-56)

**(4)** The evidence when analysed as a whole simply did not support the individual defendants' posit that the plaintiff had intended to give them such a big bounty. The court accepted the plaintiff's evidence summarised in these words that 'if I truly intended to give the shares to such named shareholders as a gift instead of on a nominal basis, I would have mentioned it to my family. For example, I gifted eight shop lots in Taman Pelating, Bahau to some of my family members, including my wives, my siblings and my children. I mentioned this openly to my family members and many are aware of this.' He had told the individual defendants that they were holding his shares on trust for him. The conduct and surrounding circumstances were equally pointed, in that the plaintiff's intention was and had always been plain. The plaintiff, in cross-examination, said in no less than 50 occasions that 'he put name only'. He never once said otherwise. He also said in no less than 27 occasions to the effect that the companies/assets/shares are '100% all mine'. (para 69)

**(5)** The individual defendants' conduct, besides being dishonest, was also fraudulent, whether equitable fraud or common law fraud. To prove equitable fraud, the plaintiff need not demonstrate that the individual defendants had an intention to deceive. The plaintiff only needs to show that there was a relationship of trust and confidence between the parties and that there had been unconscionable conduct by the individual defendants. That there was a relationship of trust or confidence between the individual defendants and the plaintiff could not be disputed. Their clinging on to the 70% wealth of the plaintiff, taking over his business and enriching themselves at the plaintiff's expense was unconscionable to come within equitable fraud. (paras 98 & 99)

**(6)** The court would not just blindly accept the individual defendants' *ipse dixit* assertion that the transfer of shares to them was a gift but would instead protect the aged and infirm from being tricked or misled in any way by others, and yes, including his own children in whom he reposed trust and confidence into parting with his property. An alleged gift must be proved, and only if a gift is proved will the law not question the rationale no matter how improvident the gift and inconsistent with hitherto values and beliefs. It was very clear that the individual defendants, by their stratagem of the so-called gifts, were salting away and securing their own nest. The evidence in support of the individual defendants that the transfers or allotment of shares were gifts to them was weak, both inherently unbelievable and inherently improbable given the circumstances of this case. The respective individual defendants' account that the plaintiff intended a gift to them of the shares was not credible. There was sufficient evidence leaning in favour of the plaintiff's case. (paras 104, 105, 108 & 109)

**(7)** The presumption of advancement was rebutted and must be found against the individual defendants. The plaintiff was entitled to all the shares registered in the individual defendants' name on the basis of the pleaded trust. The beneficial interest thus 'resulted' back to the plaintiff. The elements of imposing a constructive trust were also present such that to allow the individual defendants to retain the shares would be unconscionable. Whether on a resulting trust or constructive trust, the plaintiff got back his shares. Fraud whether equitable or common law fraud had also been proven. (paras 110 & 112)

**(8)** The argument by the individual defendants and the corporate defendants that the articles of association of the companies did not recognise a trust was futile. The articles did not vaporise the trust in favour of the plaintiff and did not, in any manner, affect the validity of the trust arrangement between the plaintiff and the individual defendants which was of no concern to the corporate defendants. As between the plaintiff and the individual defendants, the trust could be enforced. (para 115)

**(9)** Too modest a sum would make no impact on the individual defendants. The court had taken into consideration the conduct of the individual defendants right down to the time of judgment in opposing early trial as well as denying the plaintiff who established the family business a right of inspection of companies' records until the judicial hand of intervention was sought by the plaintiff. As children and trustees, it was the individual defendants' bounden duty to protect the interests of their aged and illiterate father and not let their own interests and self-vested agendas conflict with their duties to their father. They took advantage of their father's trust in them, of his ill-health, illiteracy and old age. There were exceptional circumstances here. The cumulative conduct of the individual defendants here justified the award of exemplary damages against them but not aggravated damages. The plaintiff was a victim of the individual defendants' greed and avarice. Each individual defendant was ordered to pay a sum of RM500,000 as exemplary damages to the plaintiff. (paras 123 & 124)

**Case(s) referred to:**

*Ayoromi Helen v. PP [2005] 1 CLJ 1 CA* ***(refd)***
*Berezovsky v. Abramovich [2012] EWHC 2463* ***(refd)***
*Big Junkyard Sdn Bhd & Anor v. Chan Kah Wai [2023] 1 CLJ 564 HC* ***(refd)***
*Bombay Cotton Manufacturing Company v. Motilal Shivlal ILR (1915) 39* ***(refd)***
*Carmarthenshire County Council v. Y [2017] 4 WLR 136* ***(refd)***
*CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd [2006] 2 CLJ 409 CA* ***(refd)***
*Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors [2013] 5 CLJ 949 FC* ***(refd)***
*Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC* ***(refd)***
*ESPL (M) Sdn Bhd v. Radio & General Engineering Sdn Bhd [2004] 4 CLJ 674 CA* ***(refd)***
*Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd & Another Appeal [2006] 1 CLJ 996 CA* ***(refd)***
*Geh Cheng Hooi & Ors v. Equipment Dynamics Sdn Bhd [1991] 1 CLJ 464; [1991] 1 CLJ (Rep) 133 SC* ***(refd)***
*Goh Jui Leang v. Tay Sing Hwa [2018] 1 LNS 828 CA* ***(refd)***
*Hart v. O'Connor [1985] 1 AC 1000* ***(refd)***
*Iftikar Ahmed Khan v. Perwira Affin Bank Bhd [2018] 1 CLJ 415 FC* ***(refd)***
*Ikumi Terada v. Jemix Co Ltd & Ors And Another Appeal [2019] 1 LNS 881 CA* ***(refd)***
*Instantcolor System Sdn Bhd v. Inkmaker Asia Pacific Sdn Bhd [2017] 4 CLJ 1 FC* ***(refd)***
*Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC* ***(refd)***
*Khaw Cheng Poon & Ors v. Khaw Cheng Bok & Ors & Another Appeal [2005] 3 CLJ 753 CA* ***(refd)***
*KTL Sdn Bhd & Anor v. Leong Oow Lai & Another Cases [2014] 1 LNS 427 HC* ***(refd)***
*Lai Fee & Anor v. Wong Yu Vee & Ors [2023] 4 CLJ 1 FC* ***(refd)***
*Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC* ***(refd)***
*Lin Ah Moy v. Lee Cheng Hor & Ors [1969] 1 LNS 96 FC* ***(refd)***
*Md Zainudin Raujan v. PP [2013] 4 CLJ 21 FC* ***(refd)***

*Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC* ***(refd)***
*Ng Pak Cheong v. Global Insurance Co Sdn Bhd [1995] 1 CLJ 223 HC* ***(refd)***
*Pembinaan Lagenda Unggul Sdn Bhd v. Geohan Sdn Bhd & Another Appeal [2018] 1 LNS 172 CA* ***(refd)***
*Perbadanan Kemajuan Pertanian Selangor v. JW Properties Sdn Bhd [2017] 8 CLJ 392 FC* ***(refd)***
*Rookes v. Barnard And Others [1964] AC 1129* ***(refd)***
*Royal Brunei Airlines Sdn Bhd v. Tan [1995] 2 AC 378* ***(refd)***
*Sean Thornton (A Minor By His Mother And Next Friend) v. Northern Ireland Housing Executive [2010] NIQB 4* ***(refd)***
*Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC* ***(refd)***
*Soon Peng Yam & Anor v. Bank of Tokyo-Mitsubishi (Malaysia) Bhd [2004] 1 CLJ 532 CA* ***(refd)***
*Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC* ***(refd)***
*Tay Choo Foo v. Tengku Mohd Saad Tengku Mansur & Ors And Another Appeal [2009] 2 CLJ 363 CA* ***(refd)***
*Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669* ***(refd)***
*Yeong Ah Chee v. Lee Chong Hai & Anor And Other Appeals [1994] 3 CLJ 20 SC* ***(refd)***
*Zung Zang Wood Products Sdn Bhd & Ors v. Kwan Chee Hang Sdn Bhd & Ors [2012] 1 LNS 250 CA* ***(refd)***

**Legislation referred to:**
Contracts Act 1950, s. 17
Evidence Act 1950, ss. 3, 114(d)
Rules of Court 2012, O. 59 r. 16

**Other source(s) referred to:**
*Bogert on Trusts,* 6th edn, p 287, s 77

*For the plaintiffs - Gopal Sreenevasan, Robert Low, Karen Yong, Michelle Chiew, Chong Lip Yi & Nanthaniel Low; M/s Robert Low & Ooi*
*For the 1st-5th & 13th defendants - Lambert Rasa - Ratnam, Andrew Chiew, Chia Oh Sheng, Lim Jun Xian & Athena Chan; M/s Lee Hishammuddin Allen & Gledhill*
*For the 6th-9th, 11th & 14th defendants - Rishwant Singh; M/s Cecil Abraham & Partners*
*For the 12th defendants - Ramsun Ho; M/s See Ramsun & Tan*

*Reported by Lina E*

## JUDGMENT

**Liza Chan Sow Keng J:**

### Introduction

**[1]** This action is a family dispute where the octogenarian plaintiff seeks the return of the shares in companies presently registered in the names of his five youngest children, the first to fifth defendants ("individual defendants"), which the plaintiff claims are held on trust for him.

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## Background

**[2]** The backdrop of this case tells of a most remarkable feat of a self-made man, with only a standard one education by reason of poverty and circumstances, illiterate and unable to read in English and Malay, who started working at eight years old to help support his family, went on to build a substantial business empire and provided for his family.

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**[3]** The plaintiff has nine children by three wives. He is a traditional Hakka Chinese patriarch, an authoritative man who headed and directed both his immediate and extended family. In running the plaintiff's business, he was a man who expected obedience and he received it. He took responsibility for the entire family and was, in turn, respected by them. Dr Liong (PW8), the plaintiff's youngest brother, explained it this way:

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> PW8 : Let me be very clear again. Looh Lim Teng, my brother, told me "I am the owner of all these shares. When I ask you to assign to whichever nephew or make them the director, you please follow my instruction". So, I say "yes, brother, that is your share and you are my eldest brother. I follow instruction". That is the usual practice over the years. Can I add a bit? *My family is a typical Hakka conventional family. We work on a very important concept called family governance. That means, we don't need contract. But by virtue of the fact he is my eldest brother and we respect him a lot, you can see over the years, all the brothers, sisters, we work tirelessly together with him. So we do not need contract. But we saw a man of honouring. That's why, when my brother asked me to do it, I will do it faithfully*. (emphasis added)

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**[4]** Six other family members of the plaintiff testified to like effect comprising: Liong Kiu (PW5), the plaintiff's younger brother, Admund Looh (PW7), the plaintiff's eldest son, Desmond Looh (PW6), the plaintiff's fourth child; Lim Meow Fook (PW2), plaintiff's brother-in-law; Lang Tuang Mauh (PW3), another of the plaintiff's brother-in-law, Chan Chung Yen (PW4), the plaintiff's daughter-in-law (Michael Leong's wife).

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**[5]** The individual defendants are five out of nine children of the plaintiff. D3 is from the plaintiff's second wife whilst D1, D2, D4 and D5 are from the plaintiff's third wife. They were involved and had employment in the plaintiff's business in its later years, effective as follows:

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| D1/Sampson Looh | : 2008 |
| D2/Bill Looh | : 2004 |
| D3/Carmen Looh | : 2012 |
| D4/Nathan Looh | : 2011 |
| D5/Shandy Looh | : 2013 |

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**[6]** At the time of filing of action, the plaintiff was 80 years of age and has had open-heart surgery in September 2020. He had to and still is undergoing dialysis on a weekly basis in Penang.

**[7]** This action was filed as a result of the individual defendants' refusal to cooperate when the plaintiff sought to put his affairs and assets in order after his open-heart surgery in September 2020.

**Assets Built Through The Years Of Plaintiff's Toil And Efforts**

**[8]** By Bill Looh's (DW2) own estimation, the assets of at least approximately 8,700 acres of oil palm plantation land alone has a conservative value ranging between approximately RM261 million and RM348 million.

**Changes In Share Ownership And Directorship After The Individual Defendants Joined The Plaintiff's Business**

**[9]** The individual defendants presently in various combinations, control the sixth to 14th (except the tenth to 12th) defendants at the Board and/or shareholder levels.

**[10]** The changes in shareholding after the individual defendants joined at various times the plaintiff's business are:

| Date | Company | No. of Shares | Percentage |
|---|---|---|---|
| **Sampson Looh (D1)** | | | |
| 26.10.2007 | Sim Lim Plantations Sdn Bhd | 75,000 | 3.75% |
| 14.04.2008 | Mestika Cemerlang Sdn Bhd | 1 | 50% |
| 08.02.2013 | Prospell Enterprise Sdn Bhd | 1,000,000 | 50% |
| 14.03.2013 | Looh Oil Refinery Sdn Bhd | 5,000 | 50% |
| 08.07.2014 | Prospell Enterprise Sdn Bhd | 1,500,000 | 50% |
| 16.02.2015 | Looh Oil Refinery Sdn Bhd | 50,000 | 1% |
| 27.12.2016 | Yoke Hoh Sdn Bhd | 860,000 | 10% |
| 17.01.2019 | Georgetown Specialist Centre Sdn Bhd | 510 | 51% |
| **Bill Looh (D2)** | | | |
| 03.03.2008 | Galaxy Attraction Sdn Bhd | 500,000 | 50% |
| 05.05.2008 | Galaxy Attraction Sdn Bhd | 1,900,000 | 50% |
| 14.03.2013 | Looh Oil Refinery Sdn Bhd | 5,000 | 50% |
| 02.09.2016 | Privilege Vintage Sdn Bhd | 10,000 | 1% |
| 15.12.2016 | Prospell Enterprise Sdn Bhd | 25,000 | 0.5% |
| 27.12.2016 | Yoke Hoh Sdn Bhd | 1,634,000 | 19% |
| 23.01.2017 | Prospell Enterprise Sdn Bhd | 25,000 | 0.5% |
| 17.01.2019 | Georgetown Specialist Centre Sdn Bhd | 200 | 20% |
| 04.04.2019 | Prospell Enterprise Sdn Bhd | 450,000 | 9% |
| 25.04.2019 | Privilege Vintage Sdn Bhd | 90,000 | 1% |

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|---|---|---|---|
| **Carmen Looh (D3)** | | | |
| 16.02.2015 | Looh Oil Refinery Sdn Bhd | 50,000 | 1% |
| 02.09.2016 | Privilege Vintage Sdn Bhd | 10,000 | 1% |
| 27.12.2016 | Yoke Hoh Sdn Bhd | 688,000 | 8% |
| 19.12.2018 | Georgetown Specialist Centre Sdn Bhd | 490 | 49% |
| 04.04.2019 | Prospell Enterprise Sdn Bhd | 500,000 | 10% |
| 23.04.2019 | Georgetown Specialist Centre Sdn Bhd | 290 | 29% |
| 25.04.2019 | Privilege Vintage Sdn Bhd | 90,000 | 1% |
| **Nathan Looh (D4)** | | | |
| 02.09.2016 | Privilege Vintage Sdn Bhd | 10,000 | 1% |
| 25.04.2019 | Privilege Vintage Sdn Bhd | 90,000 | 1% |
| 27.12.2016 | Yoke Hoh Sdn Bhd | 688,000 | 8% |
| **Shandy Looh (D5)** | | | |
| 02.09.2016 | Privilege Vintage Sdn Bhd | 10,000 | 1% |
| 25.04.2019 | Privilege Vintage Sdn Bhd | 90,000 | 1% |
| 27.12.2016 | Yoke Hoh Sdn Bhd | 430,001 | 5% |

**[11]** After the individual defendants joined the plaintiff's business, except for Shandy, the rest were appointed directors at various times as follows:

| Director | Company | Date of Appointment |
|---|---|---|
| **Sampson (D1)** | Prospell Enterprise Sdn Bhd | 1.6.2012 |
| | Yoke Hoh Sdn Bhd | 27.12.2016 |
| | Looh Oil Refinery Sdn Bhd | 18.3.2013 |
| | Sim Lim Plantations Sdn Bhd | 26.10.2007 |
| | Mestika Cemerlang Sdn Bhd | - |
| | Galaxy Attraction Sdn Bhd | - |
| | Privilege Vintage Sdn Bhd | 19.11.2018 |
| | Georgetown Specialist Centre Sdn Bhd | 22.1.2019 |
| | Seatex Plantations Sdn Bhd | - |
| **Bill (D2)** | Prospell Enterprise Sdn Bhd | 23.1.2017 |
| | Yoke Hoh Sdn Bhd | 10.10.2006 |
| | Looh Oil Refinery Sdn Bhd | 9.3.2020 |
| | Sim Lim Plantations Sdn Bhd | - |
| | Mestika Cemerlang Sdn Bhd | - |
| | Galaxy Attraction Sdn Bhd | 24.12.2007 |
| | Privilege Vintage Sdn Bhd | - |
| | Georgetown Specialist Centre Sdn Bhd | 28.2.2019 |
| | Seatex Plantations Sdn Bhd | 10.10.2006 |

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|---|---|---|
| **Carmen (D3)** | Prospell Enterprise Sdn Bhd | 11.4.2017 |
| | Yoke Hoh Sdn Bhd | 27.12.2016 |
| | Looh Oil Refinery Sdn Bhd | 18.7.2014 |
| | Sim Lim Plantations Sdn Bhd | - |
| | **Mestika Cemerlang Sdn Bhd** | - |
| | **Galaxy Attraction Sdn Bhd** | - |
| | **Privilege Vintage Sdn Bhd** | - |
| | **Georgetown Specialist Centre Sdn Bhd** | 17.4.2019 |
| | **Seatex Plantations Sdn Bhd** | - |
| **Nathan (D4)** | **Prospell Enterprise Sdn Bhd** | - |
| | **Yoke Hoh Sdn Bhd** | - |
| | **Looh Oil Refinery Sdn Bhd** | 9.3.2020 |
| | **Sim Lim Plantations Sdn Bhd** | - |
| | **Mestika Cemerlang Sdn Bhd** | - |
| | **Galaxy Attraction Sdn Bhd** | - |
| | **Privilege Vintage Sdn Bhd** | - |
| | **Georgetown Specialist Centre Sdn Bhd** | - |
| | **Seatex Plantations Sdn Bhd** | 4.7.2011 |

**[12]** The individual defendants, in various combinations, presently control the sixth to 14th (except the tenth to 12th) defendants at the Board and/or shareholder levels.

**[13]** It is not in dispute that the plaintiff had a relationship of trust and confidence with the individual defendants, being his children and close kin.

**[14]** In this case, the octogenarian plaintiff claims that all the shares in the name of the individual defendants are held on trust. He never intended to give the shares to them. The individual defendants, on the other hand, claims that the plaintiff has given away 70% of his wealth to them.

**[15]** The amended defence, in essence, states that:

(i) the plaintiff has never alleged that shares held in the individual defendants' names were beneficially owned by him or held on trust for him;

(ii) for the seventh defendant (Yoke Hoh) only, the shares were transferred to the relevant individual defendants for their "contributions";

(iii) a presumption of advancement/gift arises in relation to all the shares transferred to the individual defendants by or at the behest of the plaintiff.

**[16]** The parties' respective claims were for the full beneficial interest of 70% of his wealth, and nothing in between.

**Burden Of Proof**

**[17]** It is trite law that the plaintiffs, have both the "burden of proof" to make out a *prima facie* case as well as the initial onus of proof to adduce evidence to prove their claim. The onus of proof would only shift to the

A defendants if the plaintiffs have made out a *prima facie* case. See for *eg*, the Federal Court decision in *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418; [2017] 4 MLJ 697; where Jeffrey Tan FCJ held that:

> [56] Thus a plaintiff has both the burden of proof as well as the initial
> B onus of proof. In *Britestone Pte Ltd v. Smith & Associates FarEast, Ltd* [2007] 4 SLR 855, the Singapore Court of Appeal per VK Rajah JCA, delivering the judgment of the court, explained that at the start of the plaintiff's case the burden of proof and the onus of proof coincide:
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> > *... at the start of the plaintiff's case, the legal burden of proving the existence*
> C *of any relevant fact that the plaintiff must prove and the evidential burden of some (not inherently incredible) evidence of the existence of such fact coincide. Upon adduction of that evidence, the evidential burden shifts to the defendant, as the case may be, to adduce some evidence in rebuttal*. If no evidence in rebuttal is adduced, the court may conclude from the evidence of the defendant. If, on the other hand, evidence in
> D rebuttal is adduced, the evidential burden shifts back to the plaintiff. If, ultimately, the evidential burden comes to rest on the defendant, the legal burden of proof of the relevant fact would have been discharged by the plaintiff. The legal burden of proof – a permanent and enduring burden – does not shift. A party who has the legal burden of proof on any issue must discharge it
> E throughout. *Sometimes, the legal burden is spoken of, inaccurately, as 'shifting'; but what is truly meant is that another issue has been engaged on which the opposite party hears the legal burden of proof*.
>
> [57] The rule is that 'the onus of proof of any particular fact lies on the party who alleges it, not on him who denies it; *et incumbit*
> F *probation qui decit, non qui negat, Actori incibit* probation ... *The plaintiff is bound in the first instance, to show a prima facie case, and if he leaves it imperfect, the court will not assist him*. Hence the maxim *Potior est condition defendantis*. A plaintiff cannot obviously advantage himself by the weakness of the defence. A plaintiff's case must stand or fall upon the evidence adduced by him. When, however, the
> G defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof changes sides; and he, in his turn, is bound to show a *prima facie* case at least and, if he leaves it imperfect, the court will not assist him. *Reus excipendo fit actor*' (*Woodroffe and Amir Ali,* Vol 3 at pp 3190-3191) ... (emphasis added)

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**[18]** In the case of *Dr Shanmuganathan v. Periasamy Sithambaram Pillai* [1997] 2 CLJ 153; [1997] 3 MLJ 61, the Federal Court held:

> Sections 101, 102, 103 and 106 of the Evidence Act 1950 deal with the burden of proof. *Under s. 101, it is provided that whoever desires any court to*
> I *give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. Under s 102 the burden of proof lies on that person who would fail if no evidence at all were given on either side*.

> Under s. 103, the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Under s. 106, when any fact is especially within the knowledge of any person the burden of proving that fact is upon him.
>
> (emphasis added)

**[19]** In *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] 5 MLJ 1, the Federal Court has pronounced the position of the law on the standard of proof on fraud in civil cases is that on the balance of probabilities at para. 49 of the judgment:

> ... that at law there are only two standards of proof namely, beyond reasonable doubt for criminal cases while it is on the balance of probabilities for civil cases. As such even if fraud is the subject in a civil claim the standard of proof is on the balance of probabilities. There is no third standard ...

**The Principal Issue**

**[20]** In the tussle over the shares, the plaintiff says that all the shares in the name of the individual defendants are held on trust and he never intended to give it to them but the individual defendants posit 70% of the plaintiff's wealth was given to them. This action thus raised squarely the question of whether as a matter of fact and law, there exists an express trust or a resulting trust. This pivots on the plaintiff as the transferor's actual intention which is very fact sensitive. This intention can be direct evidence or inferred from all available evidence, including that of the plaintiff's conduct.

**[21]** The Court of Appeal in *ESPL (M) Sdn Bhd v. Radio & General Engineering Sdn Bhd* [2004] 4 CLJ 674; [2005] 2 MLJ 422 at [19], [24]; *Ikumi Terada v. Jemix Co Ltd & Ors And Another Appeal* [2019] 1 LNS 881 at [38]; *Pembinaan Lagenda Unggul Sdn Bhd v. Geohan Sdn Bhd & Another Appeal* [2018] 1 LNS 172; [2018] MLJU 196 at [96] & [97] pronounced to the effect that whether there is intention to create a trust can be determined from all the evidence before the court.

**[22]** If the merits are with the plaintiff, then he will succeed; otherwise, his claim will be dismissed.

**The Law On Resulting And Constructive Trusts**

**[23]** As the subject matter involves a trust, it will thus be convenient to say a few words about the subject.

**[24]** The Federal Court explained how trusts are created in *Geh Cheng Hooi & Ors v. Equipment Dynamics Sdn Bhd* [1991] 1 CLJ 464; [1991] 1 CLJ (Rep) 133; [1991] 1 MLJ 293:

> Trusts are either (i) ***express trusts***, which are created expressly or impliedly by the actual terms of some instrument or declaration, or which by some enactment are expressly imposed on persons in relation to some property

A vested in them, whether or not they are already trustees of that property; *or* (ii) *trusts arising by operation of law* (other than express trust imposed by enactments) (see para 523 of 48 *Halsbury's Laws of England* (4th Ed)). *Trusts arising by operation of law could be constructive and resulting trusts*. Although we would agree with the view that a trust should not normally be imported into a commercial relationship, yet we would hold that in cases such as those involved in these appeals the court could and should consider the facts to determine whether a fiduciary relationship existed. *We therefore agreed with Mr Wong that in the present cases we must consider the circumstances concerning the relationship between the parties*. We were satisfied and agreed with the learned judge that in the circumstances agreements themselves do not contain an express clause that the proceeds of sale would be held on trust, as it is clearly manifested in the agreements and the correspondence concerned that it was the intention of the parties that the Emporium or its outlets as licensors should, after deduction of the fees and commissions agreed to be paid to them, make over to the concessionaires or consignors all payments by third customers. We also agreed with the learned judge and Mr Wong that the principle in *Re Hallet's Estate* should be applied to these cases and that the cash found in the tills of the various outlets and in the bank accounts as at 10 March 1987, are the subject matter of a trust or several trusts in favour of the concessionaires and consignors who can therefore trace the money there as well as to the proceeds of the sale to Inview Sdn Bhd.

(emphasis added)

**[25]** *Geh Cheng Hooi* made it clear that:

(i) trusts can arise by operation of law, that is, either a resulting trust or constructive trust;

(ii) the court needs to consider the relationship between the parties to determine whether there is a trust;

(iii) it is not necessary to have an express clause with the word trust in it as long as the correspondence or agreement concerned manifest an intention to create a trust.

**[26]** The Supreme Court in *Yeong Ah Chee v. Lee Chong Hai & Anor And Other Appeals* [1994] 3 CLJ 20 at p. 26; [1994] 2 MLJ 614 at p. 624; explained the three essential elements before a valid trust is said to exist:

> The 3 essentials of a valid trust are (a), certainty of words (b), certainty of subject and (c) certainty of object.

**[27]** These three certainties were also discussed in *Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd & Another Appeal* [2006] 1 CLJ 996 where the Court of Appeal said:

> [59] The law governing the certainty of a trust is that laid down by Lord Langdale MR in the seminal case of *Knight v. Knight* [1840] 49 ER 68. There it was held that for a trust to be certain three requirements must

be fulfilled. First, there must be certainty of intention. Second there must be certainty of subject matter: both in terms of the corpus and the beneficial interest. Third, there must be certainty of the objects of the trust. A trust is void if there is uncertainty in any of these three elements.

**[28]** A resulting trust gives effect to the parties implied or presumed intention. The Federal Court explained what is a resulting trust in *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751; [2010] 2 AMR 609 when referring to *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669 in the following words:

The device of a resulting trust was invented by the Court of Chancery **to give effect to the implied intention of parties in relation to the acquisition and disposal of moveable or immovable property**.

Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. **A resulting trust** is not imposed by law against the intentions of the trustee (as is a constructive trust) but **gives effect to his presumed intention**.

(emphasis added)

**[29]** The oft-cited quote of Lord Browne-Wilkinson case of *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669, 708, explained the circumstances in which a resulting trust may arise as follows:

Under existing law a resulting trust arises in two sets of circumstances: (A) *where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone* or in the joint names of A and B, *there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A* (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer: see *Underhill and Hayton* pp. 317ff, *Vandervell v. IRC* [1967] 1 All ER 1 at 8; [1967] 2 AC 291 at 312ff and *Re Vandervell's Trusts (No 2), White v. Vandervell Trustees Ltd* [1974] 1 All ER 47 at 63ff,; [1974] Ch 269 at 288ff. ... *Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention.*

(emphasis added)

**[30]** The Court of Appeal case of *Goh Jui Leang v. Tay Sing Hwa* [2018] 1 LNS 828 cited with approval Lord Browne-Wilkinson's *dicta*:

[38] *A resulting trust is an implied trust by operation of law and is meant to restore or to jump back the equitable interest in property to its original beneficial owner*. The nature is not based on the actual intention of the parties. However, *it comes from the rising of presumed intention*. Reference can be made in the case of *Westdeutche Landesbank Girozentrale v. Islington London Borough Council* [1996] AC 669 where House of Lords sets out two situations:

A (i) Situation in which a person makes a contribution to the purchase price of property

(ii) Situation in which the settlor has failed to explain the allocation of equitable interest in the property.

B [39] The case of Megarry J in *Re Vandervell's Trust* [1974] Ch 269 suggested that there are two type of resulting trust:

(i) Presumed resulting trust

(ii) Automatic resulting trust

C [40] *A presumed resulting trust is made in or a transfer is made into the name of another person without any express trust being constituted. There is a presumption that the other holds property in question on resulting trust for the real purchaser or the transferor. In other words, it is created by implication as the result of* a purchase in or *transfer into the name of another*.

(emphasis added)

D **[31]** In the case of *Lin Ah Moy v. Lee Cheng Hor & Ors* [1969] 1 LNS 96; [1970] 2 MLJ 99, the Federal Court held that inadequacy of consideration is evidence of the transferee holding the shares on resulting trust to the transferor:

E *... There was ample evidence for the learned trial judge to come to the conclusion that the transfers were made in trust*. As regards the transfers of the 300 shares, which are the subject matter of this dispute, *the learned trial judge, having seen and heard the witnesses, made a finding that there was no consideration for this transfer*. Moreover, *even assuming that there was consideration given by the appellant, surely inadequacy of the consideration, which was abundantly clear on the evidence, would be some evidence of a resulting trust*. There can certainly be F no question of a presumption of advancement in the case of a transfer from a brother to a brother or from a brother to his brother's wife. *That, in our judgment, was a sufficient answer to the fifth ground of appeal that a transfer without consideration is incapable of establishing the existence of a resulting trust. It is exactly in those circumstances that the court must find a resulting trust in favour of the original transferor*.

G It is true that a transfer without consideration creates a rebuttable presumption of a resulting trust. Was this presumption rebutted on the evidence? In our judgment, it was not. That disposed of the sixth ground of appeal.

(emphasis added)

H **Constructive Trust**

**[32]** In *Takako Sakao* (*supra*), Gopal Sri Ram FCJ, one of Malaysia's eminent jurists explained the concept and application of a constructive trust thus:

I [13] ... Traditionally, courts have declined to provide a definition of a constructive trust. As Edmund Davies LJ said in *Carl Zeiss Stiftung v. Herbert Smith & Co* [1969] 2 Ch 276 at p 300:

> English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague, so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand. But it appears that in this country unjust enrichment or other personal advantage is not a *sine qua non*. Thus in *Nelson v. Larholt* [1948] 1 KB 339, it was not suggested that the defendant was himself one penny better off by changing an executor's cheques; yet, as he ought to have known of the executor's want of authority to draw them, he was held liable to refund the estate, both on the basis that he was a constructive trustee for the beneficiaries and on a claim for money had and received to their use. Nevertheless, *the concept of unjust enrichment has its value as providing one example among many of what, for lack of a better phrase, I would call 'want of probity', a feature which recurs through and seems to connect all those cases drawn to the court's attention where a constructive trust has been held to exist*.

[14] In *Paragon Finance Plc v. DB Thakerar & Co* [1999] 1 All ER 400, Millett LJ (later Lord Millett) explained the concept of a constructive trust in terms that is difficult to improve:

> *A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another …*
>
> (emphasis added)

**[33]** The *Takako Sakao* principle that the constructive trusts arise by operation of law when unconscionable or wrongful conduct is demonstrated was cited with approval by subsequent cases of the Federal Court such as:

(i) *Perbadanan Kemajuan Pertanian Selangor v. JW Properties Sdn Bhd* [2017] 8 CLJ 392 at [58] and [59]:

> [58] From decided case authorities it has been established as a principle of law that *constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of the property (usually but not necessarily the legal owner) to assert his own beneficial interest in the property and deny the beneficial interest of another*. (See the cases of (1) *Takako Sakao v. Ng Pek Yuen & Anor.* [2010] 1 CLJ 381; [2009] 6 MLJ 751 (FC) and (2) *Vellasamy Pennusamy & Ors. v. Gurbachan Singh Bagawan Singh & Ors.* [2012] 2 CLJ 712; [2010] 5 MLJ 437 (CA)).
>
> [59] *It has also been held that a constructive trust is a trust which is imposed by equity in order to satisfy the demands of justice and good conscience without reference to any express or presumed intention of the parties*. (See the case of *Hassan Kadir & Ors. v. Mohamed Moidu Mohamed & Anor.* [2011] 5 CLJ 136 (FC)). A constructive trust is a remedial device that is employed to prevent unjust enrichment. It has the effect of taking the title to the property from one person whose title unjustly enriches him, and transferring it to another who has been

A unjustly deprived of it. (See the case of *Tay Choo Foo v. Tengku Mohd Saad Tengku Mansur & Ors. And Another Appeal* [2009] 2 CLJ 363; [2009] 1 MLJ 289 CA). (emphasis added)

(ii) in *Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors* [2013] 5 CLJ 949; [2014] 4 MLJ 64, the Federal Court elucidated:

B [32] A trust is an obligation enforceable in equity, which rests on a person as owner of some property, for the benefit of another or for the advancement of certain purposes (*Principles of the Law of Trusts* by HAJ Ford and WA Lee). As distinct to a trust for a purpose, a beneficial owner may enforce it by a suit as in the C current case. Equity, which was historically dispensed by the Chancery Court, and against his person (*ie*, *in personam*) now compels the trustee to administer the trust in accordance with his conscience, with even a possible sanction of imprisonment until he has made good the loss caused to the trust property. On the issue of restitution, Lord Denning MR in *Hussey v. Palmer* [1972] 3 All D ER 744 had occasion to say at p. 747:

> Although the plaintiff alleged that there was a resulting trust, I should have thought that the trust in this case, if there was one, was more in the nature of a constructive trust … By whatever name it is described, it is a trust imposed by law E whenever justice and good conscience require it. It is a liberal process, founded on large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it. The trust may arise at the outset when the property is acquired, or later on, as the circumstances F may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.

[38] From the various opinions above it may be construed that *a constructive trust arises by operation of law irrespective of the intention of the parties*, in circumstances *where the trustee acquires property for the benefit of the beneficiary, and making it unconscionable for him to assert his own beneficial interest in the* G *property and deny the beneficial interest of another*. Being bereft of any beneficial interest, and *with equity fastened upon his conscience, he cannot transfer any interest to himself let alone a third party*. If he does, then a constructive trust comes into existence. *An aggrieved party, by equitable remedy, may demand restitution of the property if he has been deprived of his beneficial interest*. (emphasis added)

H

(iii) recently in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] 12 MLJ 67:

I [111] It is trite law that the intention to create a trust is applicable in situation of express trusts and not in constructive trusts. A constructive trust are trusts that may be implied in the absence of any declaration/intention of a trust, where the trustee has induced

another to act to their detriment they would acquire a beneficial interest in the land/property. *A characteristic feature of this trust does not owe its existence to the parties' intention, but by operation of law*. In *Takako Sakao (f) v. Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751, it was held that:

> A constructive trust is imposed by law irrespective of the intention of the parties. And it is imposed only in certain circumstances, *eg*, where there is dishonest, unconscionable or fraudulent conduct in the acquisition of property. What equity does in those circumstances is to fasten upon the conscience of the holder of the property a trust in favour of another in respect of the whole or part thereof.
>
> [112] *Constructive trust is viewed as a device under which equity will intervene so as to create a trust relationship between the parties in order to make a person accountable for the trust to prevent any unfairness or injustice*. Equity will impose obligation on the defendant to hold the property for the benefit of another.
>
> (emphasis added)

**[34]** *Bogert on Trusts* 6th edn, p. 287, sec. 77 states:

> Constructive trusts do not arise because of the expressed intent of a settlor. They are not "intent-enforcing" trusts, but in a general way may be called "fraud-rectifying" trusts, if the word "fraud" is used in the sense of any kind of wrongdoing and not confined to an intentional false representation.
>
> It would seem preferable to treat these trusts as created by courts of equity, rather than to regard them as being brought into being as a result of acts of the parties. Whenever equity finds that one has title to property, real or personal, originally acquired by any kind of wrongdoing or, although innocently obtained, now held under such circumstances that retention of the title will result in unjust enrichment, equity may declare such title-holder to be the trustee of a trust constructed by it for the purpose of working out justice, which is merely a convenient means of remedying a wrong. It is not a trust in which the trustee is to have duties of administration lasting for an appreciable period of time, but rather a passive, temporary trust, in which the trustee's sole duty is to transfer the title and possession to the beneficiary.
>
> The decree establishing the constructive trust amounts to a holding that the defendant ought to be treated as if he had been a trustee for the plaintiff from the time the defendant began to hold the property unconscionably. The constructive trust does not exist merely because of the wrongful holding, but requires a court decree for its origin and this decree is retroactive in effect to the date when the unlawful holding began.

**[35]** The following excerpt from Halsbury's cited in *Tay Choo Foo v. Tengku Mohd Saad Tengku Mansur & Ors And Another Appeal* [2009] 2 CLJ 363; [2009] 1 MLJ 289 sums up the concept and application of constructive trusts:

> [93] On constructive trusts, *Halsbury's Laws of England* (4th Ed - Reissue) Vol 48 at pp. 301-306 reads as follows:
>
> > Nature of constructive trust. *A constructive trust attaches by law to specific property which is neither expressly subject to any trusts nor subject to a resulting trust but which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property. Such a person will often hold other property in a fiduciary capacity and it will be by virtue of his ownership of or dealings with that fiduciary property that he acquired the specific property subject to the constructive trust.* A stranger who receives property in circumstances where he has actual or constructive notice that it is trust property being transferred to him in breach of trust will, however, also be a constructive trustee of that property.
> >
> > A person who holds property on a constructive trust is a constructive trustee in respect of it. He cannot claim for himself any increase in value of the property or any profits earned by it. If he becomes bankrupt, the property is not available for his general creditors but for the beneficiaries in whose favour the constructive trust subsists.
>
> (emphasis added)

*Analysis And Findings*

**[36]** I now turn to the evidence. I should at the outset state that the individual defendants' assertion at para. 3.105 of their post-trial submissions that prior to CS Hee & Co's letter dated 1 March 2022, the plaintiff never claimed the shares were held on trust for him is not true. Firstly, it is clear from the transcript of the hospital recording on 10 December 2020, read as a whole for context, that the plaintiff has asserted the shares are held on trust. The plaintiff had also asserted that the 70% shares in Prospell in the names of Sampson Looh, Bill Looh and Carmen Looh were meant for the "11 people". Secondly, the individual defendants' said assertion is also contradicted by Q&A 52 – Nathan's main witness statement; Q&A 99 - Carmen's main witness statement; Q&A 92 – Bill's main witness statement that on 25 December 2021, during the family memorial day (interchangeably "Bahau meeting"), the plaintiff had demanded that Carmen, Bill and Nathan return their shares and acknowledge in writing they are his trustees of his shares.

**[37]** To establish a resulting trust, the plaintiff will need to show that the individual defendants did not pay for the shares transferred or allotted to them, and that he had no intention of gifting the shares to the individual defendants which the individual defendants rely on as proof that the plaintiff had no such intention.

**[38]** In *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751, where Gopal Sri Ram FCJ held: A

> [17] When A purchases Blackacre in B's name, providing, let us say, the whole of the purchase price, equity presumes that the common intention of the parties is for B to hold Blackacre on a trust that results to A. This is referred to as a presumed resulting trust. That a trust should result to A is fair and just because A provided all the money and B provided nothing. But if A is B's husband, parent or guardian or otherwise stands in *loco parentis* to B, then equity presumes that the common intention of the parties isto make a gift of Blackacre to B. This is referred to as the presumption of advancement. *However, as the Court of Appeal pointed out in Hena Gek Kiau v. Goh Koon Suan [2007] 6 CLJ 626 the correct approach to cases where a gift is asserted is*: B C
>
> > *... for a court first to determine the true intention of the purchaser.* The question whether the purchaser in a particular case had a donative intention is to be determined objectively through a meticulous examination of the facts and evidence of the surrounding circumstances. *If after such an examination the court concludes that there was a donative intention on the part of the purchaser that is the end of the matter and there is no room for the operation of the presumption of resulting trust or advancement as the case may be. It is only where there are no or insufficient facts or evidence from which a fair inference of intention may be drawn that a court should turn to presumptions as a last resort to resolve the dispute*. D E
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> In arriving at this conclusion the Court of Appeal in that case applied with approval the following passage in the judgment of Gabriel Moss QC (sitting as a Deputy High Court Judge) in *Kyriakides v. Pippas* [2004] EWHC 646 (Ch) which we also regard as being good law: F
>
> > Where there is no declaration (of intention), the court puts itself in the position of a jury and considers all the circumstances of the case, so as to arrive at the purchaser's real intention: Snell paras 9-15. It is only where there is no evidence to contradict the presumption that it will prevail: *ibid*. The case law has developed in such a way that even 'comparatively slight evidence' will rebut the presumption and a 'less rigid approach should also be adopted to the admissibility of evidence to rebut the presumption of advancement': *Lavelle v. Lavelle* [2004] EWCA Civ 223 (CA) per Lord Phillips MR at para 17. G H
> >
> > *I suspect the position we have now reached is that the courts will always strive to work out the real intention of the purchaser and will only give effect to the presumptions of resulting trust and advancement where the intention cannot be fathomed and a 'long-stop' or 'default' solution is needed.*
> >
> > (emphasis added) I

**[39]** I take note that the individual defendants have relied on the presumption of advancement arising out of the close relationship of father and children. The presumption of advancement no doubt gave the individual defendants as recipients of the shares, an advantage which, if not negated, will operate to form the basis of proof. However, this was not a case where the parties were not present to give evidence of their intentions. In this significant aspect, I agree that the presumption of advancement only comes into play if the plaintiff's intention cannot be discerned from the evidence and the authorities cited by the parties are to be distinguished in this respect. The plaintiff here, although elderly, sickly and testified from hospital numerous days and, in the course of trial, had his legs amputated, has the mental faculties or clarity of mind to provide the court with useful evidence of his intentions and personal knowledge. He had defended the presumption of advancement on the basis that he was still competent to testify as to his intentions regarding the transfer which was to create a trust or to retain the beneficial interest in the shares of his companies. Unless supported by objective evidence, the presumption of advancement will not be given greater weight.

**[40]** In assessing the plaintiff's evidence, I will at the outset declare that I agree with the plaintiff's counsel that more latitude should be given to the vulnerable witnesses with medical conditions such as the plaintiff, especially when evidence was being given through a translator – see *Zung Zang Wood Products Sdn Bhd & Ors v. Kwan Chee Hang Sdn Bhd & Ors* [2012] 1 LNS 250; [2012] 5 MLJ 319, where the Court of Appeal made the following observation about a similarly elderly and infirm witness:

> [59] *We note, as the JC has noted, that the father was 81 years old at the time of the trial. He was frail looking and sickly. He attended each and every sitting of the trial to complete his evidence*. Being the founder of the family business, he brought Mathew into the family business. He gave Mathew an overseas education and credited him with a Master's degree in Business Administration, besides substantial shares in the family business. He appointed Mathew to manage all the family companies. *The JC also observed the father's demeanour, anger, disappointment and bitterness at being cheated by Mathew. He found the father to be honest and straightforward witness, albeit a bit inconsistent due to his memory lapse, confusion, old age and ill health*. There was no reason for the father to lie at all, especially at his advanced age and poor health.
>
> (emphasis added)

**Plaintiff's Evidence**

**[41]** The plaintiff, as a traditional Hakka man, is a firm believer in certain core values which he tried to impart to his children. These values included unity within the family, fairness, equality, and the preservation of wealth. All the individual defendants agreed that they too believed in these values. The plaintiff's vision and fervent wish was for his assets, which he

accumulated over 50 years, to be passed down through the generations for at least 50 years. The thought of breaking up his assets for distribution was odious to him.

**Witness Statement PW1A**

*70. Q:* ***Could you please tell this Honourable Court your family values?***

A: 70.1 First and foremost, *I value unity within my family*. I do not like my family to be divisive.

70.3 Due to my values and belief in family unity, I never intended to divide my assets. I am mindful that for a family with multiple wives and children, a division of assets is akin to a division of the family. This happens to a lot of the tycoons. I do not want that to happen to my family. Also, it is "pantang" (against my superstitious belief) to talk about division of my assets during my lifetime.

70.4 I am also mindful that having 3 wives and our respective children, I in fact have 3 families. I have strived and endeavoured to treat all my children in my 3 families equally and fairly to promote unity amongst them all. For instance, I took all of my children into my companies. I believe that by treating everyone equally, there will be less chance for disputes. They will be able to stay united and preserve the family wealth.

70.5 *I have also imparted the values of fairness and equality in my children*. In this regard, I often reminded Ah Wen, as my eldest son, to set an example by practising fairness and equality in his dealings with his siblings.

70.6 *I have a vision of having my wealth preserved and* lasting for generations of my family, that is for 50 *years with an option to extend for another 50 years. It is my wish that the welfare and interest of generations of my family (including education) will continue to be provided for and supported even after I am gone, just like how I have continuously provided for and supported my parents, my siblings, my wives and my children*. I also believe in giving back to society, hence I wish to also contribute to charity using my assets.

70.7 I know this is a challenge given the Chinese saying that the wealth and/or legacy built by the first generation does not last past the 3rd generation. As such, I have sought and strived to ensure that my wealth and legacy would sustain and endure within the Looh family by a fair distribution of my wealth amongst my family members. I believe that fair treatment will promote unity and harmony amongst my family members, which can in turn can promote enduring prosperity.

(emphasis added)

**[42]** These values of fairness, equality, unity, preservation of wealth imparted by their father, the plaintiff was candidly admitted by Sampson and Carmen Looh during cross-examintation and both further testified they each believe in those values.

**[43]** The plaintiff testified that he personally acquired and funded the acquisition of all the substantial assets associated with his empire, which began in around the 1970's. This was not challenged during the cross-examination of the plaintiff. Sampson Looh (DW1), Bill Looh (DW2) and Nathan Looh (DW4) confirmed that no substantial assets have been added to the plaintiff's empire by the individual defendants.

**[44]** P also testified that he was the boss in the family business, he was the primary decision-maker; he made all of the major decisions, including the acquisition of lands and properties and the price thereof, the acceptance of any financing, the charging of his assets or his companies' assets to the financiers, fixing of salaries of the management personnel, and more. Particularly when it comes to any financial matters, he is the one calling the shots. He brought his family members into his companies, including his younger brothers, brother-in-law and children, because he trusted them to build his business empire with him. He testified that he brought his children into the family business to train them and provide them a living whilst they gained experience and contacts. He did this for each of his children, and if they left the family business to start their own ventures, he was happy for them and wished them well. Shares that were in their names were transferred back to the plaintiff or his nominated transferee whenever required by the plaintiff.

**[45]** He adduced evidence to show due to his illiteracy and lack of formal education, he was required to rely on and trust, those who assisted him in his work and business dealings and was, in this sense, vulnerable. These trusted persons were mainly the plaintiff's family members, although there were also several individuals, not of the family, whom he relied on to get work done. These included, the late Tun Ninam Shah, a friend of the plaintiff's; Noorazman, his employee; and Wong Nam, his estate manager:

> 21. **Q: That brings us to the 1990s. Could you tell this Honourable Court more about your other business ventures in the 1990s?**
>
> A: 21.3 I recall having placed some of my trusted employees and friends in Prospell since the beginning of Prospell to either hold shares or directorships or both on my behalf. Such persons include, for instance:
>
> (i) the late Tun Ninam Shah, who was my friend;
>
> (ii) Noorazman, who helped me to liaise with the Selangor State Government at that time; and

(iii) Wong Nam, who was my estate manager based in Bahau at that time and had been working for me since my 30s. He is my first ever estate manager.

**[46]** It is not in dispute that the individual defendants were involved and had employment in the plaintiff's business in its later years, beginning with Bill Looh (DW2) in 2004. It is also not in dispute that the plaintiff had a relationship of trust and confidence with the individual defendants, being his children and thus, close kin:

(i) under cross-examination:

LR Can I refer you to ID85, Dato', page 8? This is a members' written resolution of Yoke Hoh dated 23.6.2017. Can we go to the body of the resolution, Dato'? Can I put it to you this resolution shows Ah Peng, Ah Wei, Pik Loo, Jit Siang and Loo Yi, as shareholders of Yoke Hoh, approved, amongst others, the execution of a 3rd Party charge by Yoke Hoh in favour of Bank Pertanian Malaysia Berhad for banking facilities granted to Prospell.

PW1 If the signing is for the use of the estate, then the signing and all, it was only me, Ah Hoi and Ah Peng only. If there is going to be any signing, I should be the one who signing as a chairman. How to believe them? They only taking salaries from me, you think lah. Because last time, they said they can do it online, can go online. And then I said can do online.

TRANSL Then witness said –

PW1 Last time asked me to come and sign –

TRANSL And then witness said –

PW1 I also don't know. I wouldn't be giving to them. Because now for signing, now you ask me to come and sign, so the best, my lawyer has to be in there, then only I know what is he telling me to sign. Last time was different, I trusted my son and daughter. Now, everything must let the lawyer see first. Then only I can understand and then lawyer ask me to sign, then I sign.

(ii) in his witness statement WSPW1A:

57. Q: *What were the considerations which you took into account in deciding who to name as the registered directors and shareholders in your companies?*

A: 57.1 *The primary consideration is trust and loyalty. I would only name myself or persons whom I trusted at that time as the registered directors and shareholders in my companies*. For instance, my wives, my siblings and in laws, *my children* and some of my loyal employees.

*59. Q: Why does it not matter to you who are the named directors and shareholders of your companies?*

A: 59.1 *This is because it is known that the shares in the companies are mine*. The named directors and shareholders of my companies were or are nominal only. They were or are merely there to represent me and they hold shares for my benefit.

59.2 *Further, these persons would be persons whom I trusted at that time and would do what I instruct them to do*.

*60. Q: How would such named directors and shareholders of your companies know that they were or are nominal only?*

A: 60.1 *I would have told them personally or through whoever that was handling the paperwork in respect of naming of registered directors and shareholders that these companies are mine*. The fact that the companies are mine is obvious because:

(i) I paid for everything in my companies;

(ii) I was the ultimate decision maker; and

(iii) such named shareholders did not pay for any shares registered in their names.

60.3 *Further, I never told any of such named directors and shareholders that I gave them the shares in my companies as gifts*. Everyone in my family knows that I am against the idea of dividing my assets, and I have previously mentioned that there will not be division or gifting of assets unless I expressly say so. As such, such named directors and shareholders would know that they were and are merely nominal.

60.4 In addition, if I truly intended to give the shares to such named shareholders as a gift instead of on a nominal basis, I would have mentioned it to my family. For example, I gifted 8 shop lots in Taman Pelating, Bahau to some of my family members, including my wives, my siblings and my children. I mentioned this openly to my family members and many are aware of this.

*62. Q: Why do you not deemed such documents in writing to be necessary for your family members?*

A: 62.1 All this while until the filing of this suit, all the named directors and shareholders of my companies who are my family members recognised that the companies are mine, and that they were or are merely representing me and holding shares for my benefit. They have been carrying out my instructions for decades without any issue. *Essentially, I operated based on trust and belief. This is known to all. After all, they are my family members*. Hence, I did not see any need to draw up any documents in writing before this.

(emphasis added)

(iii) witness statement PW1B:

*14. Q: Please refer to answer 56.1 of your Earlier Witness Statement where you mentioned that you decided and have control over who to name as the registered shareholders in your companies. Who decided on the shareholding of the registered shareholders?*

A: 14.1 I also decided and controlled the percentage of shares to put in the name of the registered shareholders. This has been my practice until sometime after Ah Peng started working in my companies, where I left it to Ah Peng to decide the percentage of shares to put in the names of the registered shareholders and to report to me after he decided on the shareholding, *because I trusted Ah Peng at that time*.

14.2 2 *I also trusted that Ah Peng would report to me* of the decision he made on the percentage of shares as I have told him to so report. Further, *Ah Peng knew full well of my practice in having nominees to hold shares on my behalf so I trusted that he would decide the shareholding of the nominees properly. In fact, Ah Peng once told me that he would act in the best interests of me and my family as he knew that the shares in his name was for the benefit of me as his beloved father and the family as a whole.*

(emphasis added)

(iv) in cross-examination, Sampson Looh (DW1) admitted:

GS Right. Now, taking all of that into consideration, up until you have fallen out with your father, would it be fair to say that you trusted him?

DW1 Yes.

GS Yes, and would you say that he also trusted you?

DW1 Yes.

(v) his older brother, Bill Looh (DW2) also accepted:

RL And would it be a fair statement to say that at least before this dispute started, your father trusted you?

DW2 Yes.

(vi) their half-sister, Carmen Looh (DW6) agreed:

GS And would you say, and would you accept that he had trust in you?

DW6 Yes.

(vii) their sister, Shandy Looh (DW3) agreed:

RL I'm going to suggest to you, as father and daughter, you have a special relationship with your father. Therefore, you owe him a duty to explain things to him properly.

DW3 Yes, I do owe him explanation

(viii) their youngest brother, Nathan Looh (DW4) recognised the special relationship although he disagreed as to the duty that came with it:

> RL It's one question. Never mind, you say two. So, you agree that you have a special relationship with your father, being father and son?
>
> DW4 Yes.
>
> RL Because of that special relationship, I'm going to suggest to you that you owe him a duty to explain things to him properly.
>
> DW4 Duty to explain things? I don't think so.
>
> RL And also because of that special relationship, you owe your father a duty to also explain to him properly all documents which he signs.
>
> DW4 I disagree.

(emphasis added)

**[47]** That the plaintiff was in control and the decision-maker in the companies was unshaken during cross-examination and seven of his family members PW2 to PW8, who at various times were either employed by the plaintiff or held shares and directorships at the plaintiff's behest, gave consistent evidence that the shares they had in the plaintiff's companies were at all times held on trust for him. He is the boss and they follow his instructions. and each of them who had been a shareholder returned the shares when asked to by the plaintiff; if they had been directors, they resigned at his request. The family members other than the five individual defendants who had been shareholders and directors in the P's companies included:

(i) Liong Kiu and Dr Liong, the plaintiff's brothers;

(ii) Lang Tuang Mauh and Lim Meow Fook, the plaintiff's brothers-in-law;

(iii) Admund Looh (PW7), Michael Leong, Jenny Looh, and Desmond Looh, the plaintiff's children from the first and second families; and

(iv) Chan Chung Yen, the plaintiff's daughter-in-law.

**[48]** Notably, some of these family members individuals including Admund Looh (PW7), Michael Leong, Dr Liong (PW8), Desmond Looh (PW6), Chin Yew Lian (the plaintiff's second wife and Carmen Looh's mother) and some who were not including the late Tan Peck Soo, who was the general manager of the plaintiff's group of companies also became guarantors for loans that the companies took, yet none of them asserted ownership or management rights. Chan Chung Yen (PW4), Liong Kiu (PW5) and Desmond Looh (PW6) for instance in evidence, testified when asked to do so by the plaintiff, the transfers they effected for shares held in their names were because the plaintiff was the true and beneficial owner of the shares. Dr Liong, Tan Peck Soo and Admund Looh also became guarantors for loans

taken by the companies without becoming shareholders in their own right in those companies. None of these family members paid for the shares nor received any consideration when they returned or transferred the shares to another at the plaintiff's behest.

**[49]** It is common ground that the five individual defendants and the corporate defendants also paid nothing for the transfers and allotments of shares to their names. Their evidence, when analysed, made it manifestly clear that they too took instructions from the plaintiff, although when it suited them, they would say that matters were discussed with their father before decisions were made.

**[50]** As to why there is no evidence of a written trust deed with any of his family members, the plaintiff testified:

> *62. Q: Why do you not deemed such documents in writing to be necessary for your family members?*
>
> A: 62.1 All this while until the filing of this suit, all the named directors and shareholders of my companies who are my family members recognised that the companies are mine, and that they were or are merely representing me and holding shares for my benefit. They have been carrying out my instructions for decades without any issue. *Essentially, I operated based on trust and belief. This is known to all. After all, they are my family members. Hence, I did not see any need to drawup any documents in writing before this.*
>
> *62.2 To elaborate, I had always conducted my business and affairs in a very traditional manner, whereby everyone would have to obey my instructions. In fact, no one has ever questioned or disobeyed my* instructions. A lot of times, all I had to do was just *give instructions, be it in person or via phone calls, and matters will be sorted out per my instructions*. To illustrate, I used to ask my brothers in law to sign documents in Kuala Lumpur. They complied and immediately travelled from Bahau to Kuala Lumpur to sign per my instructions and without any question.
>
> (emphasis added)

**[51]** Having looked at the matter entirely, considering the copious documents and the totality of the evidence, and having carefully considered the submissions of the parties, and giving due regard to P's explanation, I find the P's evidence on why it was not necessary to record the nominee arrangement with the individual defendants, was not credibly challenged in cross-examination. Thus, P's evidence ought to be accepted – see *Soon Peng Yam & Anor v. Bank Of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 1 CLJ 532; [2004] 2 MLJ 31; and *Ayoromi Helen v. PP* [2005] 1 CLJ 1; [2005] 1 MLJ 699, where in the later case, the Court of Appeal held that:

> Failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony.

**[52]** In any event, the plaintiff's evidence as to why no nominee arrangement with the individual defendants were recorded is not inherently improbable, and I accept his evidence. I feel confident to find my conclusion based on his evidence because they are his children; there was no basis not to trust them before the shares were transferred to them. There is also consistency as with other family members before these individual defendants joined the business and were registered as shareholders. In this regard, in assessing the facts in issue on the basis of their 'inherent probability or improbability', I have taken heed of amongst others, the elucidations in:

(i) *Md Zainudin Raujan v. PP* [2013] 4 CLJ 21; [2013] 3 MLJ 773:

> [33] *It is trite that the inherent probability or improbability of a fact in issue must be the prime consideration in deciding whether a witness is credible or not. It is the duty of the court to sieve the evidence and to ascertain what are the parts of the evidence tending to incriminate the accused which he accepted*. In *Public Prosecutor v. Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 79 Augustine Paul J (as he then was) summed up the tests for determining the credibility of a witness as follows:
>
> > *The Privy Council has stated that the real tests for either accepting or rejecting the evidence of a witness are how consistent the story is with itself, how it stands the test of cross-examination, and how far it fits in with the rest of the evidence and the circumstances of the case* (see *Bhojraj v. Sitaram* 1936 AIR PC 60). ... It must, however, be observed that being unshaken in cross-examination is not *per se* an all – sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration (see *Muniandy & Ors v. Public Prosecutor* [1966] 1 MLJ 257). It has been held that if a witness demonstrably tells lies, his evidence must be looked upon with suspicion and treated with caution, but to say that it should be entirely rejected would be to go too far (see *Khoon Chye Hin v. Public Prosecutor* [1961] 1 MLJ 105). *(It has also been held that discrepancies and contradictions there will always be in a case. In considering them, what the court has to decide is whether they are of such a nature as to discredit the witness entirely and render the whole of his evidence worthless and untrustworthy)* (see *De Silva v. Public Prosecutor* [1964] 1 MLJ 81). The Indian Supreme Court has pointed out that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments (see *Ugar v. State of Bihar* 1965 AIR SC 277). It is useful to refer to *Public Prosecutor v. Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 where Raja Azlan Shah FJ (as His Highness then was) said at p 19:
> >
> > > In my opinion, *discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened ... The question is whether the existence of certain discrepancies is sufficient to destroy their credibility*. There is no rule of law that the testimony of a witness must either be

believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other.

*In the absence of any contradiction, however, and in the absence of any element of inherent improbability, the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted* (see *Public Prosecutor v. Mohamed Ali* [1962] 1 MLJ 257). (emphasis added)

(ii) *CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd* [2006] 2 CLJ 409; [2006] 3 MLJ 1 per Gopal Sri Ram JCA (as His Lordship then was):

[53] In our judgment, *the correct approach to the judicial assessment of evidence in a case where a witness has been contradicted by his or her previous inconsistent statement is to treat the whole of the evidence of that witness with caution*. But the judge must consider and accept or reject, for good reasons, the explanation given by the witness for the inconsistency. *He may accept the whole or parts of the witness' evidence as inspires confidence in him as having a ring of truth for one or more reasons. For example, the evidence in question or parts of it may be consistent with the probabilities of the case or with other irrefragable evidence. Or the judge may, after paying careful attention to the demeanour of the witness, feel assured that his evidence in court is consistent with the probabilities of the case and is the truth*.

(emphasis added)

**[53]** From documentary evidence before the court, including direct evidence of the plaintiff and his family members, it is manifestly plain that the plaintiff had no intention of gifting shares in his companies to anyone, including the individual defendants, but had instead always intended to retain beneficial interest in the shares of his companies.

**[54]** Even if I am wrong, nevertheless, there is a consistent course of conduct by the plaintiff to enable court to find a presumption of intention in favour of the plaintiff pursuant to s. 114(d) of the Evidence Act 1950, which provides:

Court may presume existence of certain fact

114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

...

(d) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist is still in existence.

**[55]** With the presumption of intention, it falls on the individual defendants to rebut the presumption.

**[56]** The individual defendants proffer of (i) a bare denial of the plaintiff's long-standing practice of putting shares in the names of family members and trusted third parties and the plaintiff's intention; (ii) feigning no knowledge of the plaintiff's arrangements with these family members and trusted third parties; and denial that the same arrangement applied to them and the shares they hold in the companies do not add to their case. Bare denials do not go towards discharging the onus or evidential burden of proof shifted to them given the weighty evidence adduced by the plaintiff – *Letchumanan Chettiar*.

**[57]** The fact that the individual defendants are in possession of share certs of the various shareholding which they now hold do not add to their case one whit. This is because the court will not overlook that the plaintiff is illiterate and dependent on others to manage and handle documents. His evidence is that the share certificates were kept in a safe in Bahau. He had never relinquished possession of them. Until this dispute began, he had no cause to doubt that the share certificates would still be in the Bahau safe. It is also the plaintiff's evidence that Carmen Looh (DW6) and Madam Yun, the secretary, had access to the safe, and if the individual defendants now had possession of the share certificates, it is because Carmen Looh would have taken them out without his knowledge. This evidence is telling:

GS I'm also going to suggest to you that if you took these share certificates, you took them without telling your father.

DW6 I –

GS In other words, your father never knew that you were holding these certificates.

DW6 *I didn't tell my father about taking this.*

GS *Yes. You didn't tell your father that you had possession and were holding the share certificates.*

DW6 *I didn't tell him.*

GS *Good. And I have to ... I'm going to say to you that your father never said to you. "Please keep these certificates", as well.*

DW6 *He didn't say that.*

(emphasis added)

**[58]** There you have it. Added to that, none of the other four individual defendants, have claimed that the plaintiff had allowed them to take the share certificates, or even that he was aware they had the share certificates in their possession. I thus agree with plaintiff's counsel that this, puts paid to their reliance on the share certificates and it is entirely plausible that the evidence about the individual defendants' possession of share certificates is more likely than not to have been as a result of legal advice rather than a natural occurrence arising from the agreement of the plaintiff.

**[59]** On a consideration of the entire evidence and not bits here and there, no doubt is left in my mind that the plaintiff never intended to give the five children his shares; they were his children, and there was no basis at that time, they could not be trusted for mere *eg*, this passage when he was under cross-examination:

> LR Can I put it to you, Dato', you know perfectly well all these claims are not true, insofar as your five youngest children are concerned?
>
> PW1 Disagree, what you say.
>
> LR Can I also put it to you, Dato', that since Ah Peng, Ah Wei and Pik Loo acquired their shares in Prospell, they have exercised their rights as shareholders in their own right and not as a nominee?
>
> PW1 I disagree. I already said I 100% I control, I haven't divided the family yet. Haven't divided yet. If I am going to divide it, I am going to divide it in an equal shares. I got nine children, three wives. I cannot be giving them to divide to only few of them specifically. What is the reason, what is the grounds? Yes, it is different if he is helping the company. Because these shares, these keys, Pik Loo has been taken it, so Pik Loo has taken it, she can actually burn it with fire or anything. **Because everything I trusted my daughter, because one is a son, one is a daughter. Then, that was why I sign all to them**.
>
> (emphasis added)

On the balance of probabilities, the plaintiff has made out *prima facie* case that it was his consistent practice and intention that members of his family and third parties, including the individual defendants, always held shares in his companies as trustees and if they were directors, as his nominees.

**[60]** Naturally, I have considered the plaintiff's character – as the patriarch of a large and traditional Hakka Chinese family, of a generation where the eldest son would assume responsibility for looking after his immediate and extended family. His family circumstances combined to leave him with little formal education and no literacy in English and Malay; he was working by the age of eight as a rubber tapper. In the autumn of life, the plaintiff has built a business empire consisting of at least 8,700 acres of palm oil plantation land which generated, over the last 20 years, an average of RM25.4 million in revenue through his leadership, vision and funding. I readily agree with the plaintiff's, counsel that "this is, by any measure, a success story, hard-earned and hard-won."

**[61]** He rules the roost as the head of the family and the business he was in charge. I accept that "He was "Da Ge", big brother, to his siblings, and was respected as the boss and the head. Many of his family members worked

A in the plaintiff's companies, including his older children. Some of them were there for decades, some for shorter periods. They were there and they helped, assisted and yes, contributed to the plaintiff's business."

**[62]** As mere example (and there are many examples) to debunk the individual defendants' tale of "sacrifice" and "contributions", Admund B Looh (PW7) being the eldest of the plaintiff's son and in what is the equivalent of a "Prince Charles" now "Prince Harry" in a traditional Hakka family, too had shares in the companies that were registered in his name. Admund Looh's unchallenged evidence was that he chose to stop his tertiary education in the UK because he did not want to financially burden the C plaintiff. Admund Looh then returned to Malaysia to assist the plaintiff in the family business and stayed with the plaintiff for at least ten years. By Sampson Looh's standards, this must surely constitute a "sacrifice". Even so, Admund Looh did not claim that the shares belonged to him because the plaintiff would never have given away his hard-earned assets. Another D example is Liong Kiu (PW5), the plaintiff's younger brother, also known as Uncle Hoi. Liong Kiu's unchallenged evidence was that he had been working with his brother, the plaintiff, for about 50 years. The plaintiff called Liong Kiu his right-hand man. It cannot be disputed that 50 years of service must surely count as a contribution. Sampson Looh and Liong Kiu were both E registered as 50% shareholders in Mestika Cemerlang on the same day, yet only Sampson claims that the share belongs to him absolutely. Liong Kiu was steadfast that the 50% he held was held on trust for the plaintiff as were shares in his name in a timber company. He also corroborated the plaintiff's evidence that share certificates are kept in the safe in the Bahau office.

F **[63]** I reject Sampson Looh's version of events as being inherently improbable when one takes into account the value of the shares he held in Mestika Cemerlang and Sim Lim. Mestika Cemerlang was the owner of approximately 39 acres of land in Buloh Kasap, Segamat, which Sampson accepted had a purchase price of RM8 million. This meant that his 50% G shareholding, allegedly given to him in 2008 for nothing more than joining his father's business, was worth at least RM4 million. As for Sim Lim, it was a company newly incorporated for the purpose of entering into a very valuable joint venture agreement with Yayasan Negeri Sembilan for the development of a new oil palm estate. It was most curious that Sampson Looh told no one about his father's munificence which turned him at H 25-years-old into a multi-millionaire. His reason for this silence – a fascinating but nevertheless and unbelievable "I just didn't tell". With respect, it was not a plausible explanation for one receiving a gift of such magnitude. I find it more probable that he did not tell because it never happened. In any case, Sampson Looh's claim that Mestika Cemerlang and I Sim Lim shares were given for his contribution was not pleaded in the re-amended defence and cannot be entertained. Counsel for the plaintiff had

recorded a general reservation to object, in submissions, to any evidence that had not been pleaded. See: *Instantcolor System Sdn Bhd v. Inkmaker Asia Pacific Sdn Bhd* [2017] 4 CLJ 1; [2017] 2 MLJ 697 at [60], *Iftikar Ahmed Khan v. Perwira Affin Bank Bhd* [2018] 1 CLJ 415; [2018] 2 MLJ 292 at [27].

**[64]** Neither do I find convincing the tale by the individual defendants have whipped up before this court of "sacrifice" and "contributions", of "rescuing" their father and his companies. According to them, the family business was in dire straits because of the poor management by the plaintiff and the elder sons from the first and second families. After they joined the family business, they successfully rehabilitated the business of the plantation companies and, these efforts so impressed or moved their father that he gave them 70% of his wealth and control over his companies and assets. The fact of the matter is, despite there were some problems with the banks on loans, the objective documentary evidence shows that at all times, the companies had a substantial land bank which provided a surplus of assets over liabilities. The companies' assets could and were used to satisfy their debts. Indeed, despite the sale of assets to satisfy these loans, the plaintiff still preserved at least approximately 8,700 acres of plantation land. There is no evidence at all that any of the individual defendants had advanced any money at all, not even one cent in personal funds, to settle the company loans. Thus, in alleging the companies had gone to rack and ruin at the hands of the plaintiff and other family members and, in the process, exaggerating their "contributions" besides sounding hollow, particularly when as alluded earlier, added nothing to the individual defendants' tale. It seems to me an ill-conceived machination, and not to be countenanced by the court. As part of the restructuring, which Sampson carried out, Yoke Hoh was placed under Prospell which gave him 50% indirect control of Yoke Hoh. Prior to Yoke Hoh being "moved" to becoming a subsidiary of Prospell, it, together with Seatex, was a subsidiary of LLT Holdings. LLT Holdings as a holding company was completely clean. It is also the individual defendants' case that part of the restructuring, was a transfer of shares in Yoke Hoh from Prospell to the other four individual defendants. This too made little sense other than enriching themselves as these transfers could have occurred while Yoke Hoh was still a subsidiary of LLT Holdings except that other members of the family may have come to know of it. When the lack of logic in this was put to Sampson Looh, it was telling that he had no answer.

**[65]** Sampson also credited himself with the 'turning around' of the companies on the basis of the audited financial statements of Prospell for the years 2020 and 2021. However, when this evidence was tested in cross-examination, what became apparent was that any improvement in the companies' fortunes could be directly attributed to these factors:

A (i) the injection of Sim Lim into the plaintiff's business. It will be recalled that the Sim Lim deal was included by the plaintiff;

(ii) a substantial increase in the price of palm oil in 2020. In fact, Carmen Looh, Sampson Looh and Bill Looh accepted this fact during Prospell's Board of Directors meeting on 25 May 2022; and

B

(iii) by the individual defendants' own evidence, the efforts of the operations staff on the plantations.

**[66]** The other four individual defendants, evidence on their contributions are not spectacular, far from it and appears to be calculated to support C Sampson's machinations that are patently an exercise in self-aggrandisement, and a disingenuous opportunistic posturing to explain away their actions to take over 70% of the plaintiff's assets for themselves. The plaintiff's counsel aptly described their contribution as "when held up to the light however, they were nothing more than a marketing exercise or the proverbial chicken D which "bertelur sebiji, riuh sekampung". Their contributions in my view, when analysed, certainly do not outweigh that of other family members who had also contributed to the business. All things considered, there is simply no good reason for the individual defendants to justify their entitlement to 70% of his assets and for Sampson Looh, if one accepts that he did make E some "contributions", it cannot reasonably or with any degree of proportion entitle him to half of the plaintiff's business empire and wealth in the hundreds of millions of ringgit. I do not find him to be a credible witness.

**[67]** Notably, the share transfer forms here to the individual defendants do not reflect "alleged contributions" or for love and affection; it stated money's F worth instead which individual defendants did not pay.

**[68]** At any rate, it is significant that the individual defendants' plea on "contributions" at para. 117(c) of the re-amended defence is only in respect of Yoke Hoh. There is also no plea that the shares were given for their "continuing contribution'. The individual defendants are bound by their G pleadings – see *Instantcolor System* (*supra*) at [60] and *Iftikar Ahmed Khan* (*supra*) at [27].

## Not Gifts

**[69]** The plaintiff had vehemently disavowed any gift to the individual H defendants of his shares. The evidence, when analysed as a whole, simply does, not support the individual defendants posit that the plaintiff had intended to give them such a big bounty. I accept the plaintiff's evidence summarised in these words that "if I truly intended to give the shares to such named shareholders as a gift instead of on a nominal basis, I would have I mentioned it to my family. For example, I gifted eight shop lots in Taman Pelating, Bahau to some of my family members, including my wives, my siblings and my children. I mentioned this openly to my family members and many are aware of this." And he has told the individual defendants that they

were holding his shares on trust for him. The conduct and surrounding circumstances are equally pointed, in that the plaintiff's intention was and has always been plain. In his own words numerous times, the shares "100% are mine" and were "put name only". Counsel for the plaintiff pointed out in fact that the plaintiff in cross-examination said no less than 50 occasions that "he put name only'. He never once said otherwise. He also said in no less than 27 occasions to the effect that the companies/assets/shares are "100% all mine".

**[70]** Already in 2016, the plaintiff was diagnosed with kidney failure. It is common ground that until this time, he was vital and fully occupied in his business both on an operational and management level. After his diagnosis in 2016 and his attempts at treatment in Switzerland, it became obvious that he would need permanent dialysis. In early 2018, he moved to Ipoh and in early 2019, he moved to Penang so that his brother Dr Liong could supervise his medical treatment.

**[71]** The evidence, both direct and indirect, and the facts and circumstances of the case demonstrated a deliberate plan conceived by the individual defendants to strip their father of his assets. It was unconscionable.

**[72]** The indubitable evidence is that the plaintiff cannot read and write in BM or English, it was not the character of the man to be totally partial to these five sons and daughters as he was reasonably even-handed with all his family.

**[73]** Evidently, he, the plaintiff, had riches and wealth. Beyond any question, he was worth many millions, and many times over.

**[74]** Such improvident gift was unusual, but he was also prudent and restrained in his ways. Indeed, like most businesses, there will sometimes be cash flow problems and lean times. With such a large family and extended family to care for to boot, the plaintiff had no choice but to be prudent and restrained, even though it was never a case of penny-pinching in his spending as the children did have private schooling and overseas tertiary education, at least for those who applied/were qualified to do so. He provided for them. He had too, a good a head on his shoulders in the way he acquired and managed his assets and loans.

**[75]** To the plaintiff, it could be reasonably said even tapping rubber at a mere age of eight years to help support his family, that taking care of his family and extended family was his mission in life and to build a hospital for the public to fulfil his late grandmother's wishes. That intention withstood the passage of time from the 1970s to this day – 50 years. As Da Ge, he looks and takes care of all; that was the measure of the plaintiff.

**[76]** The plaintiff's vision and fervent wish was for his assets, which he accumulated over 50 years, to be passed down through the generations for at least 50 years. The thought of breaking up his assets for distribution was

A anathema to him. In the draft will/trust deed – prepared by Tan Sri Rais Yatim, the plaintiff was still seeking to distribute his assets fairly amongst his nine children; it in fact reflected equality and preservation of wealth. More on this trust deed later.

B **[77]** Is it then to be believed that the plaintiff with his principle of unity, fairness, equality and preservation of wealth had love and affection only for these individual defendants to the extent that he divested his bulk of his assets to them, and even worse still put himself in a highly disadvantageous position of losing control of his business and be a minority shareholder and Board member? He, who was always in 100% control?

C **[78]** Rather, is there a systematic exploitation of an old and sickly man? Were those around him lining their pockets?

**[79]** Whether a transaction is or is not unconscionable: this is a question which depends on the particular facts of the case.

D **[80]** The facts are not edifying. Instead, they were shocking ... the evidence shows greed and avarice after the individual defendants took control of the plaintiff's business. I agree with the plaintiff's counsel that even if they made some contribution, and they ought to, considering they were paid a salary, "There is no proportionality in their assertion when taken against what they E said they contributed. It was greed pure and simple". This greed for example, is manifested in Sampson treating the company as his own private ATM machine, helping himself to millions of ringgit without any responsibility for having to put it back. What stupendously raised the eyebrows is that, Bill Looh, a director in Prospell, was not aware of this and hence could not have F approved it. Apart from treating it as his private ATM machine, Sampson Looh also used the company to treat himself to lavish tastes including liposuction, haircuts and luxury cars.

**[81]** The gifts of 70% of his wealth were so large and so improvident as not to be reasonably accounted for on the ground of the relationship of father and G son or daughter.

**[82]** In the circumstances of this case, the extraordinary bounty of 70% of his wealth equivalent to hundreds of millions handed out in the manner of say so by the individual defendants should excite grave and unremitting suspicion.

H **[83]** There is nothing to show that the plaintiff was unhappy with his other children, wives and extended family in the form of his siblings and their families. They all held his affection.

**[84]** What plausible reason then was there to explain the far-reaching I radical departure from his life-long mission of providing fairly for all his family and extended family members and to preserve wealth?

**[85]** It is not the character of the man to be totally partial to these individual defendants as he was reasonably even-handed with all family members. Really, he looked after all of them.

**[86]** Is it to be believed that the plaintiff suddenly abandoned his life-long commitment to his other family and extended family members?

**[87]** How could it not be said that the proved or admitted facts showed a relationship of confidence and an abuse of that confidence?

**[88]** Indeed, there is a very high degree of probability that those orgies of transfers could not have been unless he had taken leave of his senses OR if Sampson and the other four individual defendants had not used their position to obtain an advantage. This is because the transfers equivalent of 70% of wealth solely favoured them, the children of the third wife and a daughter of the second wife, was not satisfactorily explained. The strong suspicion that the radical change of a value and belief held for half a century was not the result of the free volition of the plaintiff was not removed.

**[89]** They, who took the extraordinary bounty and assumed majority power in the plaintiff's business have the burden of proof that the transfers were fair and reasonable; that no advantage had been taken of the plaintiff's position and that no information which should have been communicated had been withheld. They failed to dispel bad faith, failed to substantiate the honesty and righteousness of the transfers.

**[90]** In the instant case, the individual defendants have not adduced evidence to show that all care had been taken by them that the plaintiff was put in possession of all material facts and information so as to enable him to decide fairly, fully and freely what he wanted to do with his property.

**[91]** In the circumstances of this case, the individual defendants placed in the position they were in relation to the plaintiff, must be in full view and complete appreciation of what he was doing.

**[92]** In my respectful view, the individual defendants should, not only have drawn the plaintiff's attention to the effects upon the execution of the transfer, but also its consequential effect including all resolutions causing him to lose control of his business.

**[93]** By keeping silent, they had actively concealed the material facts and thus committed dishonesty against the plaintiff and their family members.

**[94]** The definition of dishonesty, is set out in the judgment of Lord Nicholls in the decision of the Privy Council in *Royal Brunei Airlines Sdn Bhd v. Tan* [1995] 2 AC 378; [1995] 3 All ER 97; [1995] 3 WLR 64 where he said:

> *... Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further,*

A *honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty*. Thus *for the most part dishonesty is to be equated with conscious impropriety*.

However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular
B circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. ...

"All investment involves risk. *Imprudence is not dishonesty,* although *imprudence may be carried recklessly to lengths which call into question the honesty of the person making the decision*. This is especially so if the transaction serves
C another purpose in which that person has an interest of his own."

"... Ultimately, in most cases, *an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct*."

(emphasis added)

D

**[95]** It is also useful to refer to s. 17 of the Contracts Act 1950 where it defines 'fraud' as follows:

Fraud' includes any of the following acts committed by a party to a contract or with his connivance, or by his agent, with intent to deceive
E another party thereto or his agent, or to induce him to enter into the contracts:

(a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;

(b) the active concealment of a fact by one having knowledge or belief
F of the fact;

(c) a promise made without any intention of performing it;

(d) any other act fitted to deceive; and

(e) any such act or omission as the law specially declares to be
G fraudulent.

**[96]** Case laws suggest that the evidence required to prove an allegation of dishonesty, stands on the same footing as an allegation of fraud, which in most cases, would depend on circumstantial evidence to prove the allegation. In *Ng Pak Cheong v. Global Insurance Co Sdn Bhd* [1995] 1 CLJ 223; [1995]
H 1 MLJ 64; [1994] 3 AMR 2663, Mohamed Dzaiddin J (as he then was) dealt with the reception of circumstantial evidence in proving fraud. The learned judge said, "... it is not the law of evidence that every step in the allegation of fraud had to be proved by calling live and admissible evidence nor is it the law that fraud cannot be inferred in the appropriate case. The inference,
I however, should not be made lightly; the circumstantial evidence must be so compelling and convincing that bearing in mind the high standard of proof the inference is nevertheless justified ...".

**[97]** In *CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd* (*supra*) Gopal Sri Ram JCA (later FCJ) said:

> ... While mere suspicion is insufficient, it is not the law that a litigant who alleges fraud must unravel each and every act of the person accused of fraud. Like any other fact, fraud may be inferred from circumstantial evidence with the added proviso that **there must be a foundation of evidence and not mere suspicion**. (emphasis added)

**[98]** The evidence is undeniable. The individual defendants' conduct is besides being dishonest is also fraudulent, whether equitable fraud or common law fraud. To prove equitable fraud, the plaintiff need not demonstrate that the individual defendants have an intention to deceive; the plaintiff only need to show that there was a relationship of trust and confidence between the parties, and that there has been unconscionable conduct by the individual defendants – see *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751:

> [23] The 'fraud' of which Lord Halsbury spoke in *Salomon v. A Salomon & Co Ltd* includes equitable fraud. In the recent Australian case of *The Bell Group Ltd (In liquidation) v. Westpac Banking Corporation (No 9)* [2008] WASC 239; 70 ACSR 1, Owen J discussed the distinction between equitable fraud and fraud at common law. His Honour said:
>
> > 4849 One of the leading Australian texts on equitable principles is R Meagher, D Heydon and M Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th Ed, 2002). When I refer to this text from time to time in these reasons I will do so by the shortened phrase '*Meagher, Gummow and Lehane*'. At [12-050] the authors set out a non-exhaustive list of factual and legal situations that have traditionally been treated as species of equitable fraud. They include:
> >
> > (a) *misrepresentation by persons under an obligation to exercise skill and discharge reliance and trust (for example in fiduciary relationships), and inducements to contract or otherwise for the representee to act to his detriment in reliance on the representation;*
> >
> > (b) *the use of power to procure a bargain or gift, resulting in disadvantage to the other party;*
> >
> > (c) *conflict of interest against a duty arising from a fiduciary relationship;* and
> >
> > (d) *agreements which are bona fide between the parties but in fraud of third persons.*
> >
> > ...
> >
> > 4853 This, then, marks out a significant difference between common law fraud and equitable fraud. The latter does not require proof of an actual intention to deceive.

A

> To summarise, a plea of fraud at common law will not succeed absent proof of an intention to deceive. *Such an intention is not an ingredient of equitable fraud which is, essentially speaking, unconscionable conduct in circumstances where there exists or is implied or imposed a relationship of trust or confidence*.
>
> (emphasis added)

B

See also *KTL Sdn Bhd & Anor v. Leong Oow Lai & Another Cases* [2014] 1 LNS 427; [2014] MLJU 1405 at [93].

**[99]** As alluded earlier, that there is a relationship of trust or confidence between the individual defendants and the plaintiff cannot be disputed. Their C clinging on to the 70% wealth of the plaintiff, taking over his business, and to enrich themselves at the plaintiff's expense is unconscionable to come within equitable fraud. The Privy Council in *Hart v. O'Connor* [1985] 1 AC 1000 at p. 1024C described unconscionable conduct as follows:

> ... "Fraud" in its equitable context does not mean, or is not confined to, D deceit; "it means an unconscientious use of the power arising out of these circumstances and conditions" of the contracting parties; *Earl of Aylesford v. Morris* (1873) L.R. 8 Ch. App. 484, 491. **It is victimisation, which can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances**.
>
> (emphasis added)

E

**[100]** The plaintiff will have to show intention for common law fraud – *Takako Sakao* (*supra*):

> [23] ... The term common law fraud is often used to describe the tort of deceit, or the making of fraudulent misrepresentations. The tort of deceit F is said to encompass cases where the defendant knowingly or recklessly makes a false statement, with the intention that another will rely on it to his or her detriment ... In *Armitage v. Nurse* [1997] EWCA Civ 1279; [19981 Ch 241; [19971 3 WLR 1046, Millett LJ discussed the meaning of 'actual fraud' in the context of an exemption clause. At p 1053, His Lordship described actual fraud as connoting, at least, '*an intention on the* G *part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests or not*'
>
> (emphasis added)

**[101]** Once fraud is proven, it vitiates all transactions whatsoever. Fraud H unravels all. As cited by the Federal Court in *Lai Fee & Anor v. Wong Yu Vee & Ors* [2023] 4 CLJ 1; [2023] 3 MLJ 503 at [63]:

> [63] In *CIMB Bank Bhd v. Maybank Trustees Bhd And Other Appeals*, the Federal Court ruled that a party which had committed fraudulent misappropriation of trust monies could not benefit from its own fraud and I that that party cannot rely on the exemption clause under the contract as a defence. Ariffin Zakaria CJ writing for the Federal Court referred to the following remarks of Lord Bingham in *HIH Casualty and General Insurance Ltd*, at para [15]:

> ... fraud is a thing apart. This is not a mere slogan. It reflects an old legal rule that ***fraud unravels*** **all:** ***fraus omnia corrumpit*****. It also reflects the practical basis of commercial intercourse.** ***Once fraud is proved, 'it vitiates judgments, contracts and all transactions whatsoever'*****:** *Lazarus Estates Ltd v. Beasley* [1956] 1 QB 702 at p 712, per Lord Justice Denning: 'Parties entering into a commercial contract will no doubt recognise and accept the risk of errors and omissions in the preceding negotiations, even negligent errors and omissions. But each party will assume the honesty and good faith of the other; absent such an assumption they would not deal'.
>
> (emphasis added)

**[102]** I note the deafening silence too even at the three meetings/discussions prior to the plaintiff's open-heart surgery on 29 September 2020 ("pre-surgery meetings"), post-surgery 10 December hospital meeting, the phone call of 17 May 2021 and the meeting at Bahau during the ancestral memorial day on 25 December 2021 ("Bahau meeting") where the plaintiff and all his children attended (except Sampson and Shandy). If the 70% of the plaintiff's wealth were given to them, there was not a whisper of protest nor reminder registered with the plaintiff that these shares were no longer his. And they knew conflict was brewing because one of them went and saw lawyers after the Bahau meeting. In this regard, the consistency of the plaintiff's intention and wishes of a fair and equitable distribution is fortified by the following:

(i) the individual defendants asserted that the dinner at CRC Restaurant three days before open-heart surgery was a celebration dinner and that there were no discussions of the plaintiff's intention of a fair and equitable distribution amongst his nine children, and the preservation of his assets and business empire. I accept the plaintiff's version as being inherently probable that he would have expressed his wishes and objectives, whether at the dinner at CRC Restaurant or the night before surgery as the plaintiff, facing such a major surgery and at that senior age, would be fully aware of his mortality. It would not be repugnant with common sense and logic for him to wish to put his affairs in order. There is no lack of authorities on our shores including the Privy Council case of *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1; [1989] 1 MLJ 457 that the common sense approach can be applied to achieve a just result in arriving at a decision;

(ii) Carmen Looh acknowledged in the hospital recording on 10 December 2020 secretly made by her that by the "11 people" in the recording, the plaintiff meant all nine children and the two surviving wives of the plaintiff; she acknowledged that the shares were held on trust or as nominees as made clear from the spoken Cantonese words of "doi ling". Her now opportunistic explanation that she meant to say "to lead" (as opposed to "to represent") is rejected. Significantly, she did not assert ownership when it was her own evidence under cross-examination

A that she could "stand up to the plaintiff' in instances when the plaintiff was wrong. In the face of multi-millions weighing in the bargain for her, I reject her feeble explanation that she kept silent because "because it is already common understanding between (the plaintiff and her)";

B (iii) the trust deed, which the plaintiff described as his "will", prepared by his solicitor, Tan Sri Rais Yatim, on 1 February 2020 and draft will both made provisions for the non-breakup of his assets and empire and fair distribution of the trust fund (comprising the plaintiff's assets) to all nine children and spouses and supports his case of fair and equitable distribution. Notwithstanding the individual defendants' contention that C the trust deed or will contained a list of asserts and made no mention whatsoever of the trust set up for generations, I accept the evidence of the plaintiff and his witnesses that it does not capture all of his assets at the material time and that he only found out subsequently and that this explains the plaintiff's reference to and reliance on the trust deed during D the 10 December meeting. He could not have known the trust deed did not provide for his entire assets of 100% as he does not write and read English and Malay and has to depend on others. If the individual defendants' case is to be believed, it means the plaintiff having already given away 70% of his assets, he will still be giving more assets to the E individual defendants from the plaintiff's balance of 30%. It is improbable, simply does not make sense and completely goes against the grain of his value of fair and equitable distribution if in fact he was aware the trust deed covers only 30% of his 100%. But he was not aware and having been made aware, he has terminated the trust deed;

F (iv) there is then the phone call of 17 May 2021 between Carmen Looh and the plaintiff again which Carmen Looh secretly recorded. Once more, she made no express assertion of ownership. It begs the burning question yet again WHY, if the shares were truly hers. And it must be borne in mind that the plaintiff was unguarded in both the 10 December hospital G meeting and the phone call of as he did not know his trusted daughter Carmen was secretly audio-recording both events;

(v) at the Bahau meeting which was expressly requested by the plaintiff to be recorded, as opposed to Nathan's privately and separately audio-recording of the same, Bill, Carmen and Nathan did not openly and H expressly assert that the shares registered in their names or in the names of Sampson and Shandy were given to them in consideration of their respective contribution or per the premise of their pleaded defence. In the face of the plaintiff's challenge to their continued ownership of the shares, their non-assertion of ownership at the meeting is mind-blowing. I Why did they not confront or remind their father that the shares were given to them, if indeed it was so? The irresistible conclusion can only be that they knew that the shares did not belong to them. They had ample time to prepare for the Bahau meeting as shown by the evidence.

Bill, Carmen and Nathan knew five days beforehand of the Bahau meeting that the plaintiff would seek a return of the shares registered in their names. Bill and Nathan travelled together to the Bahau meeting, these two brothers discussed the matter and according to Bill, Nathan and he would be telling the plaintiff that the shares in their names belong to them. But they did not. At the Bahau meeting, the only meaningful words Bill said were to the effect of "wait for Sampson's return". Nathan defied the plaintiff's instructions to return the shares, spoke of unrelated and incoherent events, whilst Carmen focused on her guarantorship only arising from her directorship in the companies (as opposed to shareholding). To this, the plaintiff asserted that he would discharge Carmen's guarantees. They knew conflict was brewing so Why Did They Not Say It Straight That The Shares In Their Name Belong To Them? Obviously, it must be that the shares are their father's and not theirs.

**[103]** Why did it not strike the individual defendants at all that their father would find issue with the transfers?

**[104]** This court as a court of conscience will not just blindly accept the five individual D's *ipse dixit* assertion that the transfer of shares to them is a gift but will instead protect the aged and infirm from being tricked or misled in any way by others, and yes, including his own children in whom he reposed trust and confidence into parting with his property.

**[105]** An alleged gift must be proved, and only if a gift is proved will the law not question the rationale no matter how improvident the gift and inconsistent with hitherto values and beliefs.

**[106]** Despite the purported love for their father, and each of them testified, professing that they share his values of unity, fairness, equality and preservation of family wealth, yet they cling on to the 70% and even fought their octogenarian father's bid for an early trial. Why? Because a dead man tells no tales! And they will then have in aid of their tale, the presumption of advancement!

**[107]** Providence made it possible for the plaintiff to testify despite his legs being amputated in the course of the trial, and the plaintiff has given his version – that the transfers are not gifts. I believe him. Indeed, I have no reason not to, arising from corroborated and credible evidence of his witnesses.

**[108]** It was very clear, to me that the individual defendants, by their stratagem of the so-called gifts, were salting away and securing their own nest.

**[109]** In the ultimate analysis, the evidence in support of the individual defendants that the transfers or allotment of shares are gifts to them was weak, both inherently unbelievable and inherently improbable, given the

A circumstances of this case. I find the respective individual defendants' account that the plaintiff intended a gift to them of the shares is not credible. Considering the totality of the evidence before me, there is sufficient evidence leaning in favour of the plaintiff's case.

B **[110]** This means the presumption of advancement is rebutted and must be found against the individual defendants. The plaintiff is entitled to all the shares registered in the individual defendants' name on the basis of the pleaded trust. I make the findings that the plaintiff contributed personally to the entire acquisition of all the substantial assets associated with his empire, which began in around the 1970's. He did not intend to give full beneficial C ownership of his shares to the individual defendants. Despite intensive cross-examination for 19 days from his hospital bed by the individual defendants' counsel, the plaintiff remained consistent throughout in his wishes and objectives, including a fair and equitable distribution of his assets to his nine children after his demise, non-division of his assets, preservation of D generational wealth and looking after the larger and extended Looh family including the plaintiff's siblings.

**[111]** The entirety of the evidence-in-chief, the cross-examination and the re-examination, the transcripts of audio recordings of the 10 December meeting, phone call and Bahau meeting, the documentary evidence before the E court, the conduct of the parties, assessed, weighed as a whole show to this court the plaintiff's consistent intention was always that family or third parties would hold shares for him on trust; and there is simply no good reason for the individual defendants to justify their entitlement to 70% of his assets.

F **[112]** The beneficial interest thus "resulted" back to the plaintiff. The elements of imposing a constructive trust are also present such that to allow the individual defendants to retain the shares will be unconscionable. Whether on a resulting trust or constructive trust, the plaintiff gets back his shares. Fraud, whether equitable or common law fraud, has also been G proven.

**[113]** In my considered view, on the material before the court, the plaintiff's counsel in their industry, had set out the facts and the relevant authorities in lucid details. I find myself to be in complete agreement with the plaintiff's counsel's analysis of the evidence and authorities, and am persuaded by the H force of their arguments that on the facts, there was the plaintiff's intention to create a trust or to retain the beneficial interest in the shares of his companies. I have adopted parts of their submissions in this judgment but find it unnecessary to deal with each and every point raised in all the submissions.

I

**Corporate Defendants**

**[114]** As for the corporate defendants, given the way the companies were restructured as manifested by the evidence before the court, I agree with the plaintiff's counsel that the corporate defendants' shareholdings are the result of the individual defendants' "restructuring" of the plaintiff's assets and companies. The fate of the corporate defendants is inextricably linked to that of the individual defendants who are presently in control of the corporate defendants. The evidence shows Sampson Looh to be clearly in the saddle, and took responsibility for designing and executing the entire exercise to strip their father's assets.

**Articles Do Not Recognise Trust**

**[115]** The individual defendants and the corporate defendants also argue that the articles of association of the companies do not recognise a trust. I find this argument to be futile. The articles do not vaporise the trust in favour of the plaintiff. The articles do not in any manner in my view affect the validity of the trust arrangement between the plaintiff and the individual defendants which is of no concern to the corporate defendants. As between the plaintiff and individual defendants, the trust can be enforced.

**Evaluation And Assessment Of The Credibility Of The Witnesses**

**[116]** As "evidence" is not confined to documents and the court is enjoined by s. 3 of the Evidence Act to consider oral statements by witnesses, the evaluation and assessment of the credibility (or otherwise), of the witnesses were crucial to the present case. In assessing the credibility of the witnesses, I have taken note that the credibility of a witness embraces not only the concept of his truthfulness *ie*, whether the evidence of the witness is to be believed but also the objective reliability of the witness *ie*, his ability to observe or remember facts and events about which the witness is giving evidence and this court must pay attention to a number of factors which, *inter alia*, include the following as exposited by Gillen J in *Sean Thornton (A Minor By His Mother And Next Friend) v. Northern Ireland Housing Executive* [2010] NIQB 4:

(i) the inherent probability or improbability of representations of fact;

(ii) the presence of independent evidence tending to corroborate or undermine any given statement of fact;

(iii) the presence of contemporaneous records;

(iv) the demeanour of witnesses *eg*, does he equivocate in cross-examination;

(v) the frailty of the population at large in accurately recollecting and describing events in the distant past;

A (vi) does the witness take refuge in wild speculation or uncorroborated allegations of fabrication;

(vii) does the witness have a motive for misleading the court; and

(viii) weigh up one witness against another.

B **[117]** Sir George Farwell in the Privy Council case of *Bombay Cotton Manufacturing Company v. Motilal Shivlal* ILR (1915) 39 Bom 386, PC, in addressing the credit of a witness upon cross-examination, said that 'it is most relevant in a case where everything depends on the judge's belief or disbelief in the witness' story.'

C **[118]** The tale spun by the individual defendants that they were given 70% of their father's wealth is not believable to this court and was blown to smithereens when tested under incisive cross-examination by both the plaintiff's counsel, Mr Gopal Sreenevasan and Mr Robert Low. The importance of oral evidence through cross-examination is underscored by the D following authorities:

(i) *Carmarthenshire County Council v. Y* [2017] 4 WLR 136 at [7] to [9]:

> 7 ... Oral evidence-in-chief now requires the permission of the judge be given. FPR r 22.11 provides the right to cross-examine a witness on his E or her witness statement. Thus, the general rule is that facts in issue are to be proved by written evidence-in-chief and oral evidence given under cross-examination. Of course, facts may also be proved by hearsay evidence pursuant to the Civil Evidence Act 1998 and FPR rr 23.2-23.5, *but the general rule is that oral evidence given under cross-examination is the gold standard.*
>
> F 8 ... *Why is this? It is because it reflects the long-established common-law consensus that the best way of assessing the reliability of evidence is by confronting the witness*. In *Crawford v. Washington* (2004) 124 S Ct 1354, para 62 Scalia J, when discussing the explicit command to afford cross-examination of witnesses in criminal cases contained within the Sixth Amendment to the US G Constitution, stated:
>
> > To be sure, the clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The clause thus reflects a judgment, not only about H the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf 3 Blackstone, Commentaries, at 373 ('This open examination of witnesses ... is much more conducive to the clearing up of truth'); M Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing 'beats and bolts out the truth much I better')."

> 9 It should not be thought that this consensus or viewpoint is confined to criminal causes. Thus, in *Goldberg v. Kelly* (1970) 397 US 254, a case about the entitlement to receive certain federal welfare benefits, Brennan J stated, at p 269: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."

(ii) *Berezovsky v. Abramovich* [2012] EWHC 2463 (Comm):

> 92. ... However, it would not have been practical, given the length and complexity of the factual issues involved, for the court to have required evidence in chief to have been given orally. **It was for that reason that cross-examination, in particular of Mr. Berezovsky and Mr. Abramovich, assumed such a critical importance**.
>
> (emphasis added)

**[119]** In deciding the matter, I will make clear that I have preferred the evidence of the plaintiff's witnesses, whom I viewed as 'more credible' in support of the plaintiff's contentions, as compared to the defendants' witnesses, whom I found 'evasive' when troubling questions were put to them, and were not credible. The defendants' witnesses' evidence simply does not add up. Even if there were discrepancies in the plaintiff's witnesses' evidence, if at all, were minor and not relevant, and on the whole, the plaintiff's witnesses were forthright, their evidence was comprehensive, compelling, convincing and consistent with the documents and the overall probabilities. As alluded earlier, some latitude is accorded the plaintiff due to his advanced years, testifying from hospital, medical conditions and owing to having to cope with a translator. In the context of the entirety of the evidence before the court, any lingering doubts that I have, I would resolve in favour of the plaintiff.

**Exemplary/Aggravated Damages**

**[120]** In *Khaw Cheng Poon & Ors v. Khaw Cheng Bok & Ors & Another Appeal* [2005] 3 CLJ 753; [2005] 6 MLJ 540, Gopal Sri Ram JCA (as he then was) delivering the judgment of the Court of Appeal said:

> ... **Exemplary damages are only awarded in special circumstances**. These circumstances are contained in the speech of Lord Devlin to which we have already referred, that no new categories are admissible to the Devlin list has now been settled in the decision of the House of Lords in *Cassell & Co Ltd v. Broome* [1972] AC 1027. (emphasis added)

**[121]** In *Rookes v. Barnard And Others* [1964] AC 1129, Lord Devlin stated unlike ordinary damages whose purpose is to compensate, that of exemplary damages is to punish and deter, and there are two categories of cases when it should be awarded, *viz*:

(i) oppressive, arbitrary or unconstitutional action by the servants of Government;

A (ii) the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.

**[122]** In *Big Junkyard Sdn Bhd & Anor v. Chan Kah Wai* [2023] 1 CLJ 564, the court held:

B

> [41] Thus, aggravated damages are given as additional compensation where there is injury to the feelings of the plaintiff that is caused by or exacerbated as a result of exceptional conduct of the defendant. The conduct must be high-handed or malicious act or an act done in an oppressive manner. Mere wrongful conduct is not sufficient. There must
> C be something exceptional in the act that was done. The matter was lucidly stated by Lord Devlin in *Rookes v. Barnard* [1964] AC 1129 at page 1232 as follows:
>
> > I doubt whether the facts disclosed in the summing up shows even a case for aggravated damages … present there seems to be *no*
> D *evidence that the Respondents were motivated by malevolence or spite against the appellant … Again in so far as disclosed in the summing up there was no evidence of offensive conduct or of arrogance or insolence*.
>
> [42] … there are two elements relevant to the availability of an award for aggravated damages: *firstly, exceptional or contumelious conduct or motive on the*
> E *part of the defendant in committing the wrong; secondly, intangible loss suffered as a result by the plaintiff, that is injury to feelings or personality*. Based on the above principles, the facts of the case at hand does not make out a case for aggravated damages. There is nothing exceptional about the action of the second defendant. There is no evidence of offensive conduct or arrogance or insolence of motive or that the second defendant was
> F motivated by malevolence or spite …
>
> (emphasis added)

**[123]** In *Rookes v. Barnard* (*supra*), Lord Devlin also expressed the view that awards of exemplary damages should be moderate and that the resources of the parties was a relevant consideration. It follows from this that an award
G of RM10 million sought by the plaintiff would wreak hardship on the individual defendants considering their means. I find that too modest a sum would make no impact on the individual defendants. I have taken into consideration also the conduct of the individual defendants right down to the time of judgment in opposing early trial as well as denying the plaintiff who
H established the family business a right of inspection of companies records until the judicial hand of intervention was sought by the plaintiff. As children and trustees, it is the individual defendants bounden duty to protect the interests of their aged and illiterate father and not let their own interests and self-vested agendas conflict with their duties to their father. They took
I advantage of their father's trust in them, of his ill-health, illiteracy and old age. In the plaintiff's counsel's words, "They must know that the plaintiff would agree to put shares in their names when they asked, because to him the shares were all his. They knew that the plaintiff would not trouble with

a written trust deed, because this had been his practice, for decades, with his family members. They knew, and deliberately, with intent, abused their positions of trust." There are exceptional circumstances here. The cumulative conduct of the individual defendants here justifies the award of exemplary damages against them but not aggravated damages. The plaintiff is a victim of the individual defendants' greed and avarice. Shakespeare's Act 4, Scene 3 in Hamlet aptly reflects the greed here:

> With this, there grows
> In my most ill-composed affection such
> A stanchless avarice that, were I king,
> I should cut off the nobles for their lands,
> Desire his jewels and this other's house;
> And my more-having would be as a sauce
> To make me hunger more, that I should forge
> Quarrels unjust against the good and loyal,
> Destroying them for wealth.

**[124]** For the aforesaid reasons, I order that each individual defendant pay a sum of RM500,000 as exemplary damages to the plaintiff.

**[125]** Having heard the parties on the orders to be made and clarified on 22 November 2023, there will be judgment for the plaintiff for the orders sought in the reamended SOC as clarified on 22 November 2023; consequential orders, costs of RM1,100,000 (subject to allocatur) to be paid jointly and/or severally by the individual defendants in favour of the plaintiff, Looh Keo @ Looh Lim Teng; costs of RM75,000 (subject to allocatur) to be paid jointly and/or severally by the individual defendants in favour of the 12th defendant, Privilege Vintage Sdn Bhd; interest at 5% per annum on all monetary sums (including such sum as shall be found to be due upon the taking of accounts) and costs awarded from the date of the judgment herein until the date of full realisation. The costs ordered was justifiable on account of the criteria in O. 59 r. 16 of the ROC 2012 – *inter alia*, this is not a run-of-the-mill case, the trial took 49 days.

**[126]** It has been an enjoyable trial by all accounts. I am grateful to counsel for the respective parties and thank them profusely for the very substantial efforts expended in research and their written submissions which have greatly assisted the court in arriving at a decision.